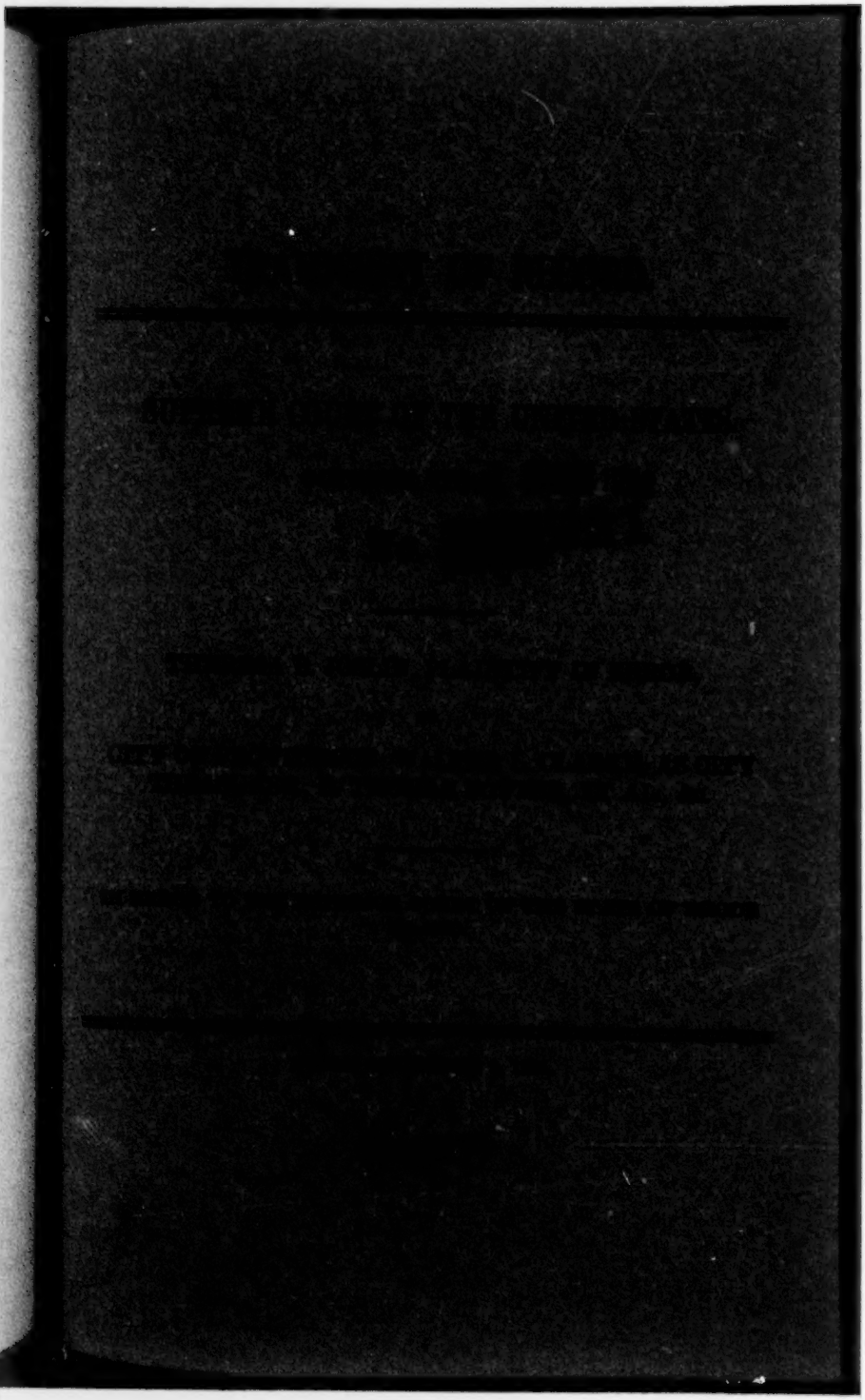


(28,597)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 642.

THERESA B. JOSLIN, PLAINTIFF IN ERROR,

vs.

CITY OF PROVIDENCE; WALTER L. CLARKE, AS CITY TREASURER; B. THOMAS POTTER, ET AL., &c.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF RHODE ISLAND.

INDEX.

	Original.	Print.
Record on certificate to supreme court	*a*	1
Caption and statement	*a*	1
Bill of complaint	1	2
Exhibit B—Notice to Theresa B. Joslin	39	22
Exhibit A—Statement of lands, etc., taken	46	24
Subpœna and officer's return of service	102	71
Appearance of defendants	104	72
Answer of defendants	105	73
Suggestion of constitutional question	116	81
Order certifying constitutional questions to supreme court	117	82
Opinion of supreme court of the State of Rhode Island, Stearns, J.	118	83
Decree of superior court dismissing bill	121	84
Clerk's certificate	122	85
Assignment of error	123	86
Petition for writ of error	129	89
Order allowing writ of error	134	92
Bond for costs	136	92
Writ of error	138	93
Clerk's certificate of lodgment	141	95
Citation and acknowledgment of service	142	95
Præcipe for transcript of record	144	96
Return to writ of error	147	97

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 6, 1922.

a STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS:

At the Superior Court of said State Holden at Providence, in said County of Providence, for the Counties of Providence and Bristol.

Equity. No. 5390.

THERESA B. JOSLIN

vs.

WALTER L. CLARKE, City Treasurer, et al.

Be it Remembered: That in the above entitled cause on the 11th day of April, A. D. 1921, Theresa B. Joslin preferred to said Court against Walter L. Clarke, City Treasurer, and others, her bill of complaint, and subpœna having been duly issued and served upon all the respondents named in said bill of complaint, appearance was entered and a joint and several answer was filed by said respondents. Thereafter, upon the 27th day of April, A. D. 1921, the fact having been brought to the attention of the Court that the constitutionality of an act of the General Assembly was clearly questioned by allegations of said bill of complaint and was brought in question upon the record and also the provisions of Section 1 of Chapter 298
b of the General Laws of Rhode Island, said constitutional questions were duly certified by said Superior Court to the Supreme Court of said State to be heard and determined.

Subsequently, upon the sixth day of July, A. D. 1921, said Supreme Court after hearing rendered its decision holding Chapter 1278 of the Public Laws of Rhode Island passed at the January Session A. D. 1915 not in violation of either Article V or Article XIV of the Amendments of the Constitution of the United States and sent back to said Superior Court for further proceedings the papers in the cause with said decision certified thereon, and thereafter, upon the 12th day of August, A. D. 1921, in said Superior Court, after hearing, said Court pursuant to said decision of the Supreme Court entered its decree dismissing said bill of complaint with costs to the respondents.

1 Superior Court of the State of Rhode Island, &c., for the Counties of Providence and Bristol.

Equity. No. —.

THERESA B. JOSLIN

vs.

WALTER L. CLARKE, City Treasurer, et al.

Bill of Complaint.

To the Hon. the Superior Court of the State of Rhode Island, Sitting in Equity, at Providence, Within and for the Counties of Providence and Bristol:

Theresa B. Joslin, of the Town of Scituate in the County of Providence and State of Rhode Island, brings this, her bill of complaint against the City of Providence, a municipal corporation, Walter L. Clarke, of said Providence in the County of Providence and State of Rhode Island, City Treasurer thereof, and against B. Thomas Potter, William P. Vaughn, William A. Schofield, John Kelso, Joseph H. Gainer, Henry A. Grimwood and Walter F. Slade, all of said Providence, constituting the Water Supply Board of said city, and thereupon your orator complaining says:

2 1. That said City of Providence is a municipal corporation, and was in the year 1915 and still is desirous of increasing and enlarging its public water supply.

2. That at the session of the General Assembly of the State of Rhode Island for the year 1915 was passed an act entitled, "An Act to Furnish the City of Providence with a Supply of Pure Water." Said act was approved on the 21st day of April, 1915, and is also denominated as Chapter 1278 of the Public Laws of 1915.

That in and by said act a board of commissioners, to be known as the Water Supply Board of the City of Providence was established in and for the City, consisting of the seven persons then members of the committee relative to increased water supply in the city, appointed by the city council of said city under resolution number 19, approved January 7, 1913, and resolution number 423, approved December 6, 1913, and Chapter 69 of the ordinances, approved December 9, 1914, the same being said individuals hereinabove mentioned as defendants and as constituting the water supply board of said city, the membership whereof has remained without change up to the present time and now constitutes said board.

3. That in and by said act it is provided in Section 3 thereof that said board, as soon as may be, shall investigate and determine as to whether a part of the north branch of the Pawtuxet river and the water shed tributary thereto would be the most available and desirable source for a supply of pure and wholesome water for the

city of Providence and for any territories now supplied, or
3 hereafter supplied under the provisions of said act, by means of the waterworks of said city, and if that source is approved, said board shall proceed to make a plan, locating a storage reservoir or reservoirs on and adjoining the said branch of said river, including any tributaries to said branch, and an aqueduct to carry water from said reservoir or reservoirs to the waterworks of said city at Sockanosset, and said board may at any time change or modify such plan or any amended plan. And, in Section 4 of said Act, that after making such a plan, said board from time to time may acquire by purchase for and in the name of said city, and said city may hold and use, such lands and such estates, easements, rights and interests therein, and such waters and water flowage rights and privileges and rights to hold and take water, as are necessary or desirable for such water supply and such reservoir or reservoirs and such aqueduct, and any dams, sluices, culverts, water and land ways and works connected therewith or incidental therto, and for executing the work of all kinds, including removing and disposing of surplus earth and other materials and for protecting and preserving the waters in such reservoir or reservoirs and the waters of said river branch and its tributaries flowing thereto, from pollution, and from the deposit therein of any matters which would reduce the quality or value of any such waters as a potable water supply, and for filtration and other works for treating such water supply, and for carrying out the purposes, directions and requirements of said act, provided however, that said board shall not make any contract for any such purchase until the city council of said city shall have first made due provision for supplying the necessary funds therefor.

4 4. But said act makes no provision for determining said fundamental question as to whether a part of the north branch of the Pawtuxet river and the water shed tributary thereto is the most available and desirable source for said pure and wholesome waer for the City of Providence and for any territories now supplied or hereafter supplied under the provisions of said act by means of the waterworks of said city, except ex parte by said water board without appeal therefrom, or any opportunity for the decision of said question by any impartial tribunal.

5. Said act further provides in Section 5 thereof that the City of Providence is thereby authorized from time to time, in the manner thereinafter provided, to acquire by condemnation any lands, improved or unimproved, and any estates, easements, rights and interests in any lands, which are included within the area enclosed by the boundary line colored red on the accompanying plat marked, "Plat of lands enclosed by red lines hereon, mostly in the town of Scituate, which may be taken by the city of Providence for water supply purposes, Samuel M. Gray, civil engineer, 1915," a plat of a part of said line at North Scituate being also shown on the accompanying and supplemental plat, entitled "Map showing location of condemnation line at and near North Scituate, Samuel M. Gray, civil engineer, 1915," and which the city council of said city deems neces-

sary for the location, construction, maintenance and operation of a reservoir or reservoirs and any dams, sluices, culverts, water and land ways, and works connected therewith or incidental thereto, and also any lands and any estates, easements, rights and interests in any lands within said area which said city council deems necessary for protecting and preserving the waters in such reservoir or reservoirs and the waters of said river branch and its tributaries flowing thereto from pollution and from the deposit therein of any matters which would reduce the quality or value of any of such waters as a potable water supply, and for filtration and other works for treating such water supply, and for carrying out the purposes, directions and requirements of said act, and also any lands and any estates, easements, rights and interests in any lands which said city council deems necessary for the location, construction, maintenance and operation of an aqueduct in a strip of land from such reservoir or the lower of any such reservoirs to said water works at Sockanosset, not to exceed two hundred feet in width, and for ways to such strip of land from the nearest public highways, and for executing the work at, adjoining or near the portals and shafts of any tunnel construction designed as part or parts of such aqueduct, including removing and disposing of surplus earth and other materials. And further provides that said city may take any such lands in fee simple or any estate, easement, right or interest in any such lands absolutely, except as in said act thereafter provided, and that upon the passage of said act, said plats shall be kept on file in the office of the secretary of state, and said boundary line enclosing said area is subsequently described in said act in Section 5 thereof, which said plats were after the pasage of said act placed and are kept on file in the office of the secretary of state, reference to said plats so on file and to the description of said boundary line in said act are hereby referred to as a part hereof.

6. But that said act leaves the final decision as to the necessity for the taking and of what shall be taken in each case to the city council of said city for its ex parte decision, without appeal therefrom or without any opportunity for an impartial consideration and determination thereof.

7. That in and by Section 6 of said Act, the city of Providence was thereby authorized from time to time, in the manner therein after provided, to acquire absolutely by condemnation, the waters of said branch of said river and its tributaries, or any part or parts thereof, included within said area shown within red lines on said plat, and any water or flowage rights or privileges appurtenant to or connected with said area or any part or parts thereof, and any waters flowing into such reservoir or reservoirs, and to there hold such waters and to appropriate and divert the same for such water supply; provided, however, that said city shall not hold or divert any such waters until such a reservoir or reservoirs is or are ready for use, and also further provided as to the flow of water below such reservoirs.

8. That the question of the necessity for said city of Providence to acquire by condemnation such waters, water and flowage rights or privileges and waters flowing into such reservoir or reservoirs and to hold the same, is left wholly to the ex parte determination of the city of Providence in the manner provided in the Act, without appeal from said decision or any opportunity for submitting the decision of such question to any impartial tribunal, other than the regulation of the flow of such waters from such containing reservoirs.

7 9. It is further provided in Section 8 of said act that within any lands included in said area, which are acquired or taken by said city thereunder, or are owned and held by said city, for the purpose of such reservoir or reservoirs and water supply, or for the protection thereof, upon such acquisition *of* taking or ownership of the same, any and all public highway rights or easements in any part or parts of such lands shall terminate, and thereafter said city may close any and all public highways therein, or if said city shall leave open any such highway or highways or permit the same to be traveled, they nevertheless shall remain the private ways of said city, and any persons or the public using the same shall not thereby acquire any right of way or public easement of travel therein, except as in said act provided, and provides for the laying out of any highways and changing of grade of highways within said act by said city, and further provides that the city may acquire by purchase or condemnation, in the manner therein provided, any lands or easements therein, which the city council of said city deems necessary to lay out and build such new roads or highways or to relocate any parts of any such existing highways, or which are required to furnish any new route or location for any portion or portions of the railroad of the Providence & Danielson Railway Company, as will more fully and at length appear by examination of said Section 8 of said act.

10. But said act does not provide for the decision of the question of the public necessity for such new highways or relocation of parts of existing highways, except by an ex parte decision of the city council without appeal therefrom or the decision of such ques-
8 tion by an impartial tribunal, although it does provide for the submission and approval of the plans of the new roads to the board of state highways or to the town council of said Scituate.

11. Said act provides in and by Section 18 thereof that said Town of Scituate, the City of Cranston, and each water or fire district therein now or hereafter incorporated, and each other town, city or water or fire district now or hereafter incorporated having any of its territory included in the drainage district of said north branch of said Pawtuxet River, or of the drainage district of said Pawtuxet River, below the junction of the north and south branches of said river, shall have the right to take and receive water from said storage reservoir or reservoirs, said aqueduct or the reservoir of said city at said Sockanosset, for use for domestic, fire and other ordinary municipal water supply purposes in the Town of Scituate or the City of Cranston, or such water or fire district therein, or in any part or

parts of such territory or territories of such other town, city or water or fire district as are included in either of said drainage districts where there is no public water supply being furnished by any public or quasi public body or corporation at the time such town, city or water district decides to take such water, and that the town of Warwick or any water or fire district therein shall have the further right to take and receive water as aforesaid for use as aforesaid in any part of its territory lying easterly of the New York, Providence and Boston railroad line of the New York, New Haven and Hartford Railroad Company and northerly of Greenwich bay, where there is no public water supply being furnished as aforesaid. Provisions are made for the making of connections and the furnishing of meters or other devices for ascertaining the quantity of water taken, and for reasonable rules and regulations from time to time by the City of Providence or its duly authorized officer or officers in charge of its water works. The right to have such water as aforesaid is limited by said act to an extent each month not exceeding an average per day of one hundred gallons per capita of the number of inhabitants of such parts of its territory or territories as are served from such water supply source or sources, as such number of inhabitants was shown by the last preceding census of the United States or of the State of Rhode Island, unless and to the extent and for the time only that said officer or officers of said city of Providence shall consent to the taking by such town, city or water or fire district of a greater quantity of such water. The act provides for the payment by such town, city and water or fire district to the city of Providence such fair wholesale rates or charges for the quantity of water taken by it as aforesaid, and at such times, and the rates fixed to continue during such periods, as may be mutually agreed upon, or in default of agreement as may be determined by arbitration as fixed in said act.

Said act further provides that the city of Providence may furnish water from such water supply source or sources to any incorporated water company for use as aforesaid in any territory included in either of said drainage districts, where at the time of beginning to furnish such water there is no public water supply, whether by a public or quasi public body or corporation other than the water supply of such water company, in any part of the territory that is supplied by such water company, or for use as aforesaid in said territory in Warwick easterly of said railroad line and northerly of said Greenwich bay.

12. But said act does not provide for the payment by said outlying towns, cities or water and fire districts and water companies of any part of the expenditures or indebtedness incurred by said city of Providence in furnishing such water supply, nor does it make any provision for any payment by said cities, towns, water and fire districts and water companies of any sum or sums into the treasury of the city of Providence to be supplied to the sinking fund in payment of indebtedness incurred in furnishing said water supply, the burden for furnishing such supply being wholly placed on

the city of Providence and its taxpayers, without providing for the assumption of any part thereof by such other communities and other corporations to which said city is allowed or compelled to furnish water from said water supply.

13. That said act in Section 21 thereof further provides that said city from time to time may lease any of its lands acquired by purchase or condemnation under said act, which are not required for such reservoir or reservoirs or other works, but are held to protect and preserve the waters thereof and the waters of said river branch and its tributaries from pollution, for such consideration or rent and upon such terms and conditions, including especially any restrictions upon the use of such leased lands and any buildings or improvements thereon, to prevent any such pollution, as may be prescribed by said board or authorized representative or representatives
11 of said city or by the city council thereof, and until otherwise provided by said city council said board in its discretion and in the name and behalf of said city may make any such leases.

14. But that the reasonableness of the taking of such lands and the purpose for which the land is held is left to the ex parte decision of said city without appeal therefrom to any disinterested tribunal.

15. That said act in Section 23 thereof further provides that relative to every taking by said city under the authority of said act of any land or lands, or any estates, easements, rights or interests in any land or lands, or any waters or water rights or privileges, said board or other authorized representative or representatives of said city, shall prepare a description of the same as proposed to be taken and also a plat showing such land or lands, together with a list of the owners thereof and persons interested therein, so far as known to said board or such representative or representatives, and shall submit such description and plat, together with such list, to the city council of said city for its action on such proposal.

16. And said act in said Section 23 thereof further provides that whenever the city council of said city shall pass any resolution to take any land or lands, or any estates, easements, rights or interests in any land or lands, or any waters or water rights or privileges, for any such purpose or purposes under any authority in said act contained, said city council within three months from the date of the passage of such resolution shall cause to be filed in the office of the town clerk or city clerk of each town or city in which any
12 such land or lands lie, or in which lie any such land or lands which would be damaged by the taking of any such waters or water rights or privileges, a statement containing a description of such land or lands or waters or water rights or privileges and specifying the nature or extent of the title therein taken, as certain as is required in a common conveyance of land, and stating that the same are taken pursuant to the provisions of said act and stating the purpose or purposes for which the same are taken thereunder, and also to file in said office a plat of such land or lands, but not neces-

sarily including in such plat any lands damaged simply by the taking of any water or water rights.

17. But that said act in no way provides for any appeal from the action of the city council in taking, or any appeal from the resolution of the city council to take, any land or lands or any estates, easements, rights or interests in any land or lands, or any waters or water rights or privileges for any such purpose or purposes under said act, or any determination of the public necessity of such taking, except by ex parte vote of said city council and without the opportunity for said question to be passed on in any way by any disinterested tribunal.

18. That said act further provides in said Section 23 thereof that upon the filing of such statement and plat, or statement as the case may be, the title to such land or lands, or estates, easements, rights or interests in land or lands, or waters or water rights or privileges, shall vest in said city of Providence in fee simple, unless a less estate or interest therein is specified in such statement as taken
13 by said city, in which case such land or lands, or estates, easements, rights or interests in land or lands, or waters or water rights or privileges, shall vest in said city to the extent and according to the nature of the title therein taken; that after the filing of such statement and plat or statement, said city may take possession of and enjoy the use of any such land or lands or any estates, easements, rights or interests in any land or lands, or any waters or water rights or privileges taken as aforesaid; provided, however, it shall not take actual possession of any such land or lands, or estates, easements, rights or interests in land or lands, or any buildings or improvements thereon, or any such waters or water rights or privileges, without the consent of the owner or owners thereof, respectively, until after the expiration of one year from the date of the filing of such statement and plat or statement, but that this proviso should not affect the provisions of Section 20 of said act or prevent said city from taking actual possession at the expiration of three months from such date, of any strips of land taken or to be used for roadways, or of any lands taken for said aqueduct or ways thereto or for said relocation of any part of the Providence & Danielson Railway Company.

19. But that said act makes no provision for the payment for any such lands or waters or rights therein before the city takes actual possession thereof, unless there has been an agreement as to the amount of such compensation by the city and the owner prior to such taking possession, or proceedings have been commenced by the owner to determine the amount of damages for such taking and such proceedings have terminated prior to such taking; otherwise
14 that said city may have the entire possession and use of the lands, waters, rights and property taken and the owner thereof be entirely deprived, not only of the title but of the actual use and possession of the property taken without receiving any compensation whatever therefor until some period long subsequent thereto.

20. That said act further provides in said Section 23 thereof that after the filing of such statement and plat or statement, notice of the taking of such land or lands, and such estates, easements, rights and interests in land or lands and such waters and water rights and privileges shall be served upon the owner of, and persons having such estates, easements, rights and interests in, and persons interested in, such land or lands and such water rights and privileges by the city sergeant of said city of Providence leaving a true and attested copy of such statement with each of such owners and persons personally or at his last and usual place of abode in this state with some person living there, and in case any such person or persons are absent from this state and have no last and usual place of abode therein occupied by any person, such copy shall be left with the persons, if any, in charge of or having possession of such land or lands taken of such absent persons, and another copy shall be mailed to the address of such absent persons if the same is known to said officer; and after such filing of such statement and plat, or statement, the city clerk of said city shall cause a copy of such statement to be published in some newspaper or newspapers published in said city at least twice a week for four successive weeks; and that on the request of any such owner or person within one year after such taking, said city
15 shall, within thirty days after such request, furnish him with a plan or description in writing of his land or lands or water rights so taken.

21. Said act further provides in said Section 23 thereof that if any such owners or persons shall agree with said city upon the price of his land or lands or his estate, easement, right or interest in such land or lands or his waters or water rights or privileges so taken, the same shall be paid to him forthwith by said city of Providence, and that any owner of, or person entitled to or interested in, any such land or lands or any such estate, easement, right or interest in any such land or lands or any such waters or water rights or privileges so taken, who shall not agree with said city of Providence on the price of his land or lands, or his estate, easement, right or interest in such land or lands or his waters or water rights or privileges so taken, may, within one year after personal notice of said taking, or if he have no personal notice may within two years from the date of such filing of such statement and plat or statement apply by petition, to the superior court within and for the county of Providence or the county in which the land or any part thereof taken or damaged as aforesaid by such taking is situated, setting forth the taking of his land or lands or his estate, easement, right or interest in such land or lands or his waters or water rights or privileges, and praying for an assessment of damages by a jury, and that upon the filing of said petition, said court shall cause twenty days' notice of the pendency thereof to be given to said city by serving the mayor of said city with a certified copy thereof, and may proceed after such notice to the trial thereof, and such trial shall determine the dam-
16 ages by him sustained by such taking of his land or lands or his estate, easement, right or interest in such land or lands or

his waters or water right or privileges, and including any lands, works and machinery surrendered by him to said city under the authority of said act, and judgment shall be entered upon the verdict of such jury and execution shall be issued against said city therefor, and such trial shall be conducted in every respect as other civil cases are tried, including the right to except to rulings and apply for new trial for cause, and that in case of conflicting claims to any such interest in any such land or lands, or to any waters or water rights or privileges, so taken, by any two or more such petitioners, said court may set down the petitions of such petitioners for trial at the same time by the same jury, and may frame all necessary issues for the trial thereof.

22. But that said act makes no provision for the postponement of the claim for such determination of such damages by a jury as aforesaid until the right or authority of the city to take such property and the regularity and propriety of the action of said city in such taking has been determined by any judicial tribunal, but that the claim for a determination of such damages if not theretofore agreed upon must be made within one year from the time of taking, notwithstanding the owner of the property disputes the constitutionality of the act and the right of the city to take thereunder and the regularity of the City proceeding under such taking.

23. That said act in and by said Section 23 thereof further
17 provides that instead of claiming any assessment of damages by jury as above referred to, any such owner or person may within the time thereinbefore prescribed for claiming such assessment apply to the Superior Court for the County of Providence for the assessment by a commission of such damages as such owner or person sustained by such taking; and said court may from time to time appoint a disinterested commission or commissions, as it shall deem necessary, to hear and determine such applications; that a person who is a resident or taxpayer in the city of Providence shall not thereby be disqualified from acting as a commissioner in any case in which the person or corporation applying for assessment of damages shall not object to such person; that any commission so appointed shall hear and determine such petitions as are referred to it by said court, and shall, as soon as it arrives at an award, report each of the same to said court, which shall fix the time for hearing any objections thereto; that if there are no objections to such award, the court shall confirm the same; if objections are filed to such award, the court shall proceed to hear the same, and may confirm said report or refer the same for a new or further hearing to the same or another commission, or may itself fix the amount of the award, as in its judgment shall be in accordance with the rights and equities of the parties. And that in all cases, any party in interest shall have the same right to an appeal from the decision of the court as is provided by law in equity causes determined by decree of said superior court, and upon the final determination of the amount of the damages awarded as aforesaid, execution shall issue in favor of the peti-

tioner and against said city therefor; but that nowhere in said
18 act is there any provision for any examination, either tentative or final, by an- disinterested commission or tribunal as to the value of the damages suffered by the owners of property taken before the city takes actual possession and use thereof, but that, so far as is provided in said act, said city may take not only the title but the actual possession and use of property within the area of condemnation after a year from the time of the filing of plat and statement in the town clerk's office of the town within which such property is situated, unless the owner thereof shall agree with said city on the valuation of such property or he shall have been able to obtain final determination within one year by proceedings commenced in accordance with said act; otherwise forcing him to submit to the surrender of his property without any payment therefor and thereby to submit to damages which may, by possibility, exceed the value of the property taken, unless the owner assents to the price of his property as fixed by the city.

24. It is further provided in Section 25 of said act that, until otherwise provided by said city council, said water board shall have general authority to represent said city and to make any agreements for said city under said act and to do any acts or things necessary for or incidental to executing or accomplishing the purposes of said act and the plans of the city council of said city adopted thereunder, but not to any extent or in any manner inconsistent with any of the express provisions of said act, and that when said board for said city takes actual possession of any land or lands acquired by purchase or condemnation under said act, it may sell, dispose of and cause to be removed any buildings or improvements thereon
19 which would obstruct the work under said act or should be removed to accomplish the purpose thereof; and that in settling any claim for damages for any lands or land taken under said act, said board may agree that any such buildings or improvements may be removed by the owner or owners from whom the same were taken in part satisfaction of such damages, but within such express time as will not impede any such work or materially delay the accomplishment of such purposes; that relative to any such sales, said board in the name and behalf of said city may give to the purchaser a bill of sale of the property sold; that all sums of money received by said board from any such sales shall be forthwith paid into the treasury of said city.

25. But that nowhere in said act is it provided that said property taken actual possession of by said board shall not be sold until the right to take such possession has been rightfully determined or that the proceeds of the property so sold shall be paid to the owner or owners thereof at any time by said city, but that the said city may receive from said board the proceeds of any such sale of property, although the owner or owners of the property so sold have never — paid therefor and cannot recover the value thereof from said city under any of the provisions of said act; moreover, the sale and removal of the buildings and improvements on the land

taken possession of by said water board is not only not postponed until the right to take the same has been lawfully determined and the value thereof ascertained, but it is not even postponed until it becomes necessary to do so to prevent the obstruction of work under the act or until it should be removed to accomplish the purpose of the act; and the question of whether it will at any time obstruct such work or should be removed is left to the ex parte decision of said water board without appeal therefrom and with no opportunity to have the same passed upon or decided by any impartial tribunal.

26. That said act provides that the right of exercising the powers to take any such land or lands or any estates, easements, rights or interest therein, or any waters or water rights or privileges, as in said act conferred upon said city, shall be exercised by said city within the period of two years from and after the date of the passage of said act and not thereafter, said act having been approved by the Governor on the 21st day of April, A. D. 1915, as hereinabove set forth.

27. That said water board investigated and determined that a part of the north branch of the Pawtuxet river and the water shed tributary thereto would be the most available and desirable source for a supply of pure and wholesome water for the city of Providence and for the territories then supplied or thereafter to be supplied under the provisions of said act, by means of the waterworks of said city, and proceeded to make a plan locating a storage reservoir on and adjoining said branch of the said river, including tributaries of said branch, and an aqueduct to carry water from said reservoir to the waterworks of said city at Sockanosset, the main dam of said reservoir to be located near and south of the village of Kent in the town of Scituate and as approximately shown by plat submitted by said board to the city council of said city and hereinafter referred to, and the location of the flow line of said reservoir being alleged as approximately shown on said plat.

28. That said water board prepared a description purporting to be a description of certain lands and estates, easements, rights and interests in lands and waters, water rights and privileges proposed to be taken, and also a plat hereinafter specified purporting to show said lands and a list purporting to be a list of the owners thereof and persons interested therein so far as known to said Water Supply Board and submitted said description, plat and list to said city council of said city for its action on said proposal, said accompanying plat consisting of a title sheet and twenty-one additional sheets numbered progressively "A-1" to "A-21," both inclusive, and said title sheet being marked as follows: "City of Providence Water Supply Board. Plat of lands in the Town- of Scituate, Foster and Johnston Condemned by the City of Providence for Water Supply Purposes under Chapter 1278 of the Public Laws of 1915. Prepared by the Water Supply Board September 30, 1916. B. Thomas Potter, William A. Schofield, Henry A. Grimwood, William P. Vaughn, John Kelso, Joseph H. Gainer, Walter F. Slade, Water Supply Board of the City

of Providence. Frank E. Winsor, Chief Engineer." "This Plat consists of this title sheet and 21 sheets numbered A-1 to A-21 inclusive. An index sheet is attached hereto for convenient reference only."

29. And that the city council of said city, in exercise or attempted exercise of the powers and authority conferred or purported to
22 be conferred by said act, passed its certain resolution No. 397, approved December 4, 1916, and entitled, "Resolution of the City Council, Taking Certain Lands and Waters for Water Supply Purposes," wherein and whereby said city elected to take and alleged that it took certain lands and estates, easements, rights and interests in lands and waters, water rights and privileges therein described, and wherein were specified, as therein alleged, the nature or extent of the title therein or thereto taken and the purpose or purposes for which the same were taken, and it provided that there be filed in the office of the town or city clerk in each of the following towns and city, namely, the Town of Scituate, the Town of Foster, the Town of Johnston, the Town of Coventry, the Town of West Warwick, the Town of Warwick, and the City of Cranston, a statement containing a description of the lands and estates, easements, rights and interests in lands and waters, water rights and privileges taken, and specifying the nature or extent of the title therein taken and stating that the same are taken pursuant to the provisions of said act and stating the purpose or purposes for which the same are taken thereunder (such statement being a recital of all of the purposes for which lands, waters or water rights might be taken under the provisions of said act, but not designating any special purpose or purposes as the occasion of the taking of any specific parcel or parcels thereof) and also a plat of said lands, the same being a duplicate of the plat accompanying said resolution with the addition of the number and date of the passage of said resolution and the signature of the Mayor thereon.

23 30. That in alleged pursuance of said resolution and in alleged conformity therewith, said city of Providence made a statement signed by its Mayor alleging that it had elected to take and took, and that the same are taken in pursuance of the provisions of said Act for the purposes thereinafter specified, all the lands and estates, rights and interests in lands and waters, water rights and privileges thereinafter described and the title therein and the nature or to the extent thereinafter specified, copy of which statement, marked "Exhibit A," is hereto annexed and hereby made a part hereof, and caused to be filed for record in the offices of the respective town clerks of the towns of Scituate, Foster, Johnston, Coventry, West Warwick, and Warwick, and in the office of the city clerk of the City of Cranston, all on the 6th day of December, 1916, said statement signed by its Mayor, together with a plat signed by him, consisting of a title sheet and twenty-one additional sheets numbered progressively A-1 to A-21 both inclusive and said title sheet being marked as follows: "City of Providence Water Supply Board. Plat of land in the Towns of Scituate, Foster and Johnston Con-

demned by the City of Providence for Water Supply Purposes Under Chapter 1278 of the Public Laws of 1915. Prepared by the Water Supply Board, September 30, 1916. B. Thomas Potter, William A. Schofield, Henry A. Grimwood, William P. Vaughn, John Kelso, Joseph H. Gainer, Walter F. Slade, Water Supply Board of the City of Providence. Frank E. Winsor, Chief Engineer.

"This Plat consists of this title sheet and 21 sheets numbered A-1 to A-21 inclusive. An index sheet is attached hereto for convenient reference only.

"Plat consisting of a title sheet and 21 additional sheets,
24 (numbered progressively A-1 to A-21 inclusive and all dated September 30, 1916), of Lands in the Towns of Scituate, Foster and Johnston, Condemned by the City of Providence for Water Supply Purposes, &c., under the provisions of Chapter 1278 of the Public Laws, entitled 'An Act to Furnish the City of Providence with a Supply of Pure Water,' passed by the General Assembly of the State of Rhode Island at its January Session, A. D. 1915, and by and in accordance with the resolution of the City Council of said City of Providence numbered 397, approved December fourth, 1916, and entitled 'Resolution of the City Council Taking Certain Lands and Waters for Water Supply Purposes.'

Joseph H. Gainer, Mayor of the City of Providence."

31. That included in said area purported to be taken is your orator's house and summer residence at Richmond in said town of Scituate.

32. That both said statement and said resolution state that the city takes all the lands and parcels of land which are therein set forth as included within a certain boundary line, therein set forth in detail, and shown in character on said plat, designated as "the boundary line of the Main Taking" in fee simple, with certain exceptions none of which is relevant hereto, except that said statement and said resolution state:

"Said city of Providence, in taking said lands and parcels of land hereinbefore set forth as included in the taking and described in the paragraph numbered 'First' herein, does not take any
25 waters now or hereafter in, on or within the same, or any rights in or to any such waters, or any right to hold, appropriate or divert any such waters, for said water supply to any greater degree or extent than hereinafter provided in the express taking of waters, and the taking of said lands and parcels of land, in respect to any waters now or hereafter in, on or within the same, is hereby made subject to any and all the conditions, limitations, restrictions, reservations, obligations and requirements of said Act pertaining to the taking of the waters of said branch of the Pawtuxet river and its tributaries."

33. That both said statement and said resolution allege with regard to the lands, estates, rights and interests in lands, which are

within the said area enclosed by said "boundary line of the Main Taking," as follows:

"And said City of Providence takes all said lands, and estates, easements, rights and interests in lands, which are within said area and are hereinbefore described as taken, for the following specified purposes: for the location, construction, maintenance and operation of said storage reservoir, (the main dam of said reservoir being located within said area near and south of the village of Kent in the Town of Scituate and as approximately shown on said plat and the location of the flow line of said reservoir being within said area and as approximately shown in character on said plat), and any dams, sluices, culverts, water and land ways, and works connected therewith or incidental thereto, and for filtration and other works for treating said water supply, and for the location, construction, maintenance and operation of an aqueduct section from said storage reservoir to the easterly line of said area, and any of the same, not required or
26 used for said reservoir and works, for protecting and preserving the waters in said river branch and its tributaries flowing thereto from pollution and from the deposit therein of any matters which would reduce the quality or value of any such waters as a potable water supply, and for the water supply purposes specified in said Act, and for locating therein and thereon the new public highways or the parts thereof within said area shown on said plat and required by said Act to be laid out and constructed by said city of Providence, and relative to the new public highway from the Danielson Pike to Rockland required by said Act to be laid out and constructed by said City, for furnishing in the part of the same within said area the Providence and Danielson Railway Company, its successors and assigns, with the new location and street railway easement therein for a single track railroad with convenient turnouts specified in said Act, and for furnishing said Company, its successors and assigns, with the new location and railroad easement specified in said Act in and across said Ponaganset-Rockland road and over land adjoining thereto and westerly thereof to the junction with the present track and location of said railroad as shown on said plat, and for said City's permitting said Providence and Danielson Railway Company, its successors and assigns, to construct and maintain a high tension electric transmission line over and under any lands and waters within said area taken by said City as provided in said Act, and for said City's permitting any telegraph, telephone, electric light or electric power transmission company at any time existing under the laws of the State of Rhode Island or of the United States to construct and maintain its lines in, over or under any lands and waters within said area taken by said City as provided in said Act, and for carry-
27 ing out the purposes, directions and requirements of said Act."

34. That both said statement and said resolution also show the taking of certain strips or parcels of land for highway purposes and for furnishing the new location of the Providence and Danielson Railway Company and for the purpose of a general burying ground

for reburying therein remains removed from portions of the Main Taking, none of which is material in this case.

35. And said statement and resolution also set forth that the city takes under said Act:

"All the waters of said north branch of said Pawtuxet River and its tributaries, included within any and all said lands and parcels of land hereinbefore taken and situated within said area of land hereinbefore described in paragraph numbered 'First' herein, and any and all water and flowage rights and privileges appurtenant to or connected with said lands and parcels of land, and any and all waters flowing into said storage reservoir, with the right to hold all said waters and to appropriate and divert the same for said water sup-ly and the water supply purposes specified in said Act, except as hereinafter set forth and provided, and subject to all the conditions, limitations, restrictions, reservations, obligations and requirements relative thereto or any thereof specified in said Act, and especially in Section 6 thereof, and especially subject to the following proviso: Provided, however, that said City of Providence shall not hold or divert any such waters until said storage reservoir is ready for use;"

28 with a further proviso as to the amount of water which shall thereafter be allowed to pass said dam in accordance with the provisions of said Act.

36. And both staid statement and said resolution state as follows:

"And said City of Providence takes all said waters and water and flowage rights and privileges to the extent hereinbefore described as taken absolutely, and for said water supply for the city of Providence, and for the territories supplied on the date of the passage of said Act in the City of Cranston and towns of North Providence, Johnston, and Warwick, and for any territories which thereafter may be supplied and to the extent that they may be supplied under the provisions of Section 18 of said Act which reads as follows:"

reciting said Section 18: and continues:

"And in taking said waters and water and flowage rights and privileges as aforesaid said City of Providence includes any and all riparian rights thereto or therein which are appurtenant, attached or incident to any and all the riparian lands, situated on said north branch of said Pawtuxet river, below said dam of said storage reservoir located near and south of said Kent, in the Towns of Scituate, Coventry and West Warwick and the City of Cranston, and situated on said Pawtuxet river, below the junction of said north branch and the south branch of said river, in the Towns of West Warwick and Warwick and the City of Cranston, to the extent that said rights are taken by said taking to the extent hereinbefore deseribed and limited."

37. And both said statement and said resolution allege:

"And any and all the aforesaid takings herein or hereunder of any and all lands, or interest therein, included in any and all public highways or roads, or parts thereof, in which the public highway easement is not permitted to be taken under said Act, are hereby expressly made subject to such public highway easement."

38. And both said statement and said resolution allege:

"And although the measurements given herein and the measurements and areas given or shown on said plat are believed to be approximately correct, yet all the lands described or delineated as included in any and all the takings herein or hereunder are hereby taken as aforesaid, whether said measurements or areas are greater or less than given or shown herein or on said plat."

39. That on the 29th day of January, A. D. 1917, said City gave your orator notice of the taking of such lands, estates, easements and interests in land or lands, and said waters and water rights and privileges, by the City Sergeant of said city leaving a true and attested copy of such statement in her hands and possession.

40. That on the 31st day of January, A. D. 1917, your orator in writing requested said city to furnish her with a plan or description in writing of her land or lands or water rights so taken, and on the 7th day of March, A. D. 1917, said City, in reply to such request, delivered to your orator, through her attorney, a statement, copy whereof, marked "Exhibit B," is hereto attached and hereby made part hereof.

This statement, as will appear by an examination thereof, disclaims being a complete or perfect description of the properties taken, and states that in case of any defect in description, or oversight or omission therefrom, of any of your orator's lands or water rights it is made without waiving, or surrendering, or affecting the taking of, any of the same which have been taken by said City thereunder.

41. That said City of Providence has acquired by purchase divers tracts of land within the condemnation area.

42. That said city has commenced work upon the construction of a dam near the village of Kent in accordance with its announced plan aforesaid, which, under the provisions of said act, it is constructing by contract; but that on account of the magnitude of the work and of difficulties growing out of war conditions, said city is not likely, as your orator is informed and believes and therefore alleges, to complete said dam under four or five years, and its probable time of construction will be more than five years; and that said city will in all probability not be able to take water for water supply purposes from the reservoirs made by said dam under about ten years from the present date.

31 43. That for the purposes mentioned in said act, the said city has no need for taking possession of your orator's property until said dam is nearly or quite completed, and the damage to your orator from the city's taking possession of your orator's property, either at the present time or at any time in the immediate future, would be manifold any benefit whatsoever the city could obtain from the same by leasing or using the same or otherwise.

44. That your orator is advised, and on information and belief avers, that said act is uncontstitutional and void, in that it violates the provisions of Articles V and XIV of Amendments to the Constitution of the United States in that under its provisions your orator and the other owners are deprived of their property without due process of law, without remedy by recourse to the laws, conformably to the laws, or by the law of the land, in that their property is allowed to be taken for a public use without just compensation, and also in that their property is allowed to be taken under color of eminent domain by the city of Providence acting under said act, when questions of the necessity of the taking as a whole or of the taking of the various parcels which are taken have not been decided by the legislature itself but have been relegated to the City of Providence to decide ex parte, without appeal and without an opportunity to have said questions heard and decided by an impartial tribunal.

45. And your orator says in connection herewith that, as a matter of fact, the taking of your orator's property is not necessary to the purposes of said act, but that said city could obtain from said north branch of the Pawtuxet river an abundant supply of pure
32 water for its purposes, far more readily and at a very small portion of the cost of the present plan, without disturbing any portion of your orator's property and without disturbing the mills, mill villages and business portions of the town taken under the present plan of condemnation, and that she has not had and does not have under said act any opportunity to raise this question or have it passed on by any impartial tribunal.

46. And your orator further says that she is advised, and therefore on information and belief alleges, that said act is unconstitutional and void, in that it violates all the foregoing provisions of the Constitution of the United States in the particulars mentioned, in that it permits said city of Providence to take the possession and use of your orator's property, and to rent, sell and dispose of the same, not only without offering any compensation therefor or having any compensation therefor permanently or tentatively determined, (the whole question of proceedings to have such damages determined being left as a burden upon your orator, in default of whose action said city may take said property on its own terms or, so far as appears by said act, without any compensation therefore) but, also, said city is allowed to take possession of all of said property and to dispose of the same, not only without paying for the same or having any value thereof determined, but also, at a time when the same is not required for the purposes of said act and may never be required

therefor, the need of said premises by said city being dependent upon the complete or permanent construction of the dam at Kent, the completion of which as aforesaid will in all probability be long
33 deferred and by possibility may never occur. And your orator avers that the question of the taking of said property for a prospective or possible need of the city is left by said act wholly to said water board, representing said city of Providence, to decide ex parte without any opportunity for an appeal or for the hearing and determination of the question by any impartial tribunal.

47. And your orator says that she is advised, and therefore on information and belief avers, that said act is unconstitutional and void, in that it violates the provisions aforesaid of the Constitution of the United States in the particulars aforesaid, in that it permits the taxpayers of said city of Providence to be burdened by a large and unnecessary expenditure and by an expenditure which is not wholly for the benefit of said city of Providence but in part for the benefit of other municipalities outside of the city of Providence which do not contribute to any portion of the expenditure for said water supply.

48. Your orator avers that she is a considerable taxpayer in said city of Providence in her own right, and indirectly, as the majority stockholder in the Joslin Manufacturing Company, a large taxpayer in said city, and is interested in the aforegoing questions as such taxpayer as well as a person whose property is taken under said act, and that in neither capacity has she any appeal from the ex parte decision of the representatives of said city of Providence in determining upon the making of said expenditure and upon the taking of land and property by the city of Providence and its sole expense
34 under the color of eminent domain, but for the benefit of other communities than the city of Providence, and that there has been and is now no opportunity for said questions to be considered and determined by any impartial tribunal.

49. Your orator says that her said property, purported to be taken as aforesaid, is her old mansion house and her present summer residence and home for the greater part of the year, and that she is much attached to the same and does not desire to dispose of it or any part thereof; that the loss of it is a great hardship to her and that if the same is taken in the immediate future her damage will be much more considerable because she says that she is a majority owner and stockholder of the Joslin Manufacturing Company, the owner and operator of six mills in the town of Scituate, the present running of which to the best advantage is of great importance to the company, and that your orator is the majority owner thereof; that she is also the majority owner and stockholder of the Scituate Light & Power Company which operates not only the power plants of said Joslin Manufacturing Company but also its own plants at the "Shoddy Mill," so-called, and at the "Remington Mill," so-called, in said Scituate, all in the near vicinity of her said home; that all of said mills and power plants are running and that the stopping of the

same would destroy the business of said Scituate Light & Power Company and do an immense damage to the business and property of the Joslin Manufacturing Company; that your orator's son, William H. Joslin, is the President and Treasurer of both of said companies and their general manager, and that it is of the utmost importance for the continuous and economical management of the same that
35 he should be in the immediate neighborhood of said mills and power plants during the greater portion of his time and it is important to have his residence in their near vicinity; that for this purpose your orator has arranged that he should have his home in said mansion house on her said property and has expended considerable sums to improve the same and make it available not only for his residence but also for an office from which he can manage the business of said companies; that there is no necessity of closing down or interfering with the running of said mills and power plants until said dam at Kent is substantially completed, which as aforesaid is not likely to be for many years; that there is no other suitable place for your orator's son and general manager of said companies to reside in the neighborhood of the mills and power plants as aforesaid and particularly because of the taking of substantially all of the residential portion of said town of Scituate by said City of Providence under said Act; that she desires this Honorable Court, as soon as the pleadings are at issue, to certify the aforegoing Constitutional questions to the Supreme Court of the State of Rhode Island for its decision and that a decree may be entered in accordance with such decision; and that, in case of decision against the constitutionality of the act and pending a consideration and decision of such questions by the Supreme Court of the State of Rhode Island, or by the Supreme Court of the United States on appeal or certification from the courts of this state, said City of Providence be enjoined from taking possession of or in any way interfering with your orator's possession and management of her said property.

36 50. And your otator says, in view of the present conditions and her need for the present use of her property aforesaid and the fact that said city does not require the possession or use thereof until said dam is entirely or substantially completed, and the fact that such completion is likely to be deferred for some years, it is grossly inequitable to permit said City of Providence to take possession of your orator's property aforesaid, not only during the pendency of the proceedings to determine such questions of constitutionality and validity of the city's taking of your orator's property, but also while said property is not required for the purpose of said act by said city of Providence, and that this Honorable Court by restraining order should prohibit said city from taking possession of your orator's property and from interfering with its management until further order from this Honorable Court.

51. That said city, through the members of its water board and its engineers and other agents and servants, has expressed an intention of taking possession of the property of your orator purported to have been taken under the provisions of said Act, immediately or

soon after the 6th day of December, 1917, and while said board, through one of its Attorneys, has also expressed an intent not to take possession of said property for several years, such expressed intent is not binding on said city, and said board can if it wishes, under the provisions of said Act, take possession at any time and that if such possession is taken your orator will be wholly without relief in the premises and will be subjected to irreparable loss as hereinabove set forth; and that your orator has no sufficient remedy in the premises except in a court of equity.

37 52. To the end, therefore, that said City of Providence, through its City Treasurer and said B. Thomas Potter, William P. Vaughn, William A. Schofield, John Kelso, Joseph H. Gainer, Henry A. Grimwood and Walter F. Slade, as members of said Water Board, may full, true and perfect answer make hereto, and to each part and allegation hereof, as though the same were herein repeated and the respondents separately interrogated in relation thereto (but not under oath, all benefit whereof is hereby waived), and that said City, and its said Water Board, its and their agents and servants, both permanently and temporarily be enjoined and restrained from taking possession of or interfering with your orator's possession of your orator's property hereinabove referred to, and that a restraining order, so restraining said City, said Water Board, its and their agents and servants, from taking possession or interfering with your orator's possession of said property until further order of the court, may be entered herein, and that your orator may have such other and further relief herein as the exigencies of her case may require and as to your Honors shall seem meet;

May it please your Honors, to grant unto your orator, not only the most gracious writs of permanent and temporary injunction restraining said City, said Water Board, its and their agents and servants, as aforesaid, with a restraining order as aforesaid, but also the most gracious writ of subpœna, out of and under the seal of this Honorable Court, commanding said City, through its City Treasurer and the aforesaid members of said Water Board, to be and appear in this Honorable Court, at a time and under a penalty to be therein fixed, and there and then, not only to make answer as afore-
38 said but to stand to, perform and abide such further orders herein as to your Honors shall seem meet and as is agreeable to equity and good conscience;

And so your orator will ever pray.

THERESA B. JOSLIN.

FRANCIS I. McCANNA,
JAMES HARRIS,
ALFRED G. CHAFFEE,
Solicitors for Complainant.

I, Theresa B. Joslin, of Scituate in the county of Providence and State of Rhode Island, on oath depose and say that I am the above named complainant; that I have read over the aforegoing bill of complaint and am acquainted with the contents thereof, and that the allegations of said bill of complaint are true of my own knowledge,

except in so far as the same are therein made upon information and belief, and the allegations so made on information and belief are true to the best of my knowledge, information and belief.

THERESA B. JOSLIN.

Subscribed and sworn to, at Scituate in the county of Providence and State of Rhode Island, on this 7th day of April, A. D. 1921.

Before me,

FRANCIS I. McCANNA,
Notary Public.

39 (EXHIBIT B.)

Providence, R. I., March 7, 1917.

To Mrs. Theresa B. Joslin:

Pursuant to your request to the City of Providence, dated January 31st, 1917, to furnish you with a plan or description in writing of your lands and water rights taken by said City pursuant to the provisions of Chapter 1278 of the Public Laws of the State of Rhode Island, approved April 21, 1915, and entitled "An Act to Furnish the City of Providence with a Supply of Pure Water," said City hereby furnishes you with the following description of the same to the extent that the same appear of record in the land records in the town clerk's office, and appear to be owned by you, or in which you appear to have some interest, so far as known by said City and its representatives, but without any admission on the part of said City that you were at the time of taking lawfully so entitled, and without relieving you of the necessity of making due claim for and duly proving your title and right to or in any lands or water rights claimed to have been owned by you at the time of any taking of any lands or water rights by said City under said Chapter 1278 of the Public Laws, and made pursuant to resolution of the City Council of said City numbered 397, approved December 4, 1916, and entitled "Resolution of the City Council Taking Certain Lands and Waters for Water Supply Purposes," and in case of any defect in description, or oversight or omission herefrom, of any of your lands or water rights without waiving, or surrendering, or affecting the taking of, any of
40 the same which have been taken by said City thereunder, viz:

A certain parcel of land with any and all improvements thereon situated in the Town of Scituate in the State of Rhode Island on the southerly side of the Plainfield Pike, and containing .46 of an acre more or less and being the same parcel conveyed from Nehemiah S. Hopkins and Esther H. Hopkins, his wife, to Theresa B. Joslin by deed dated November 11, 1879 and recorded in the lands records of said Scituate in deed book 31 at page 73, and being the same parcel of land designated and delineated as parcel number 306 on Sheet A-12 of that certain plat, entitled:

"City of Providence Water Supply Board. Plat of lands in the Towns of Scituate, Foster and Johnston Condemned by the City of

Providence for Water Supply Purposes Under Chapter 1278 of the Public Laws of 1915. Prepared by the Water Supply Board, September 30, 1916. B. Thomas Potter, William A. Schofield, Henry A. Grimwood, William P. Vaughn, John Kelso, Joseph H. Gainer, Walter F. Slade, Water Supply Board of the City of Providence. Frank E. Winsor, Chief Engineer.

"This plat consists of this title sheet and 21 sheets numbered A-1 to A-21 inclusive. An index sheet is attached hereto for convenient reference only. * * *

"Plat consisting of a title sheet and 21 additional sheets, (numbered progressively A-1 to A-21 inclusive and all dated September 30, 1916) of Lands in the Towns of Scituate, Foster and Johnston. Condemned by the City of Providence for Water Supply Purposes, &c., under the provisions of Chapter 1278 of the Public
41–44 Laws, entitled 'An Act to Furnish the City of Providence with a Supply of Pure Water,' passed by the General Assembly of the State of Rhode Island at its January Session A. D. 1915, and by and in accordance with the resolution of the City Council of said City of Providence numbered 397, approved December fourth, 1916, and entitled 'Resolution of the City Council Taking Certain Lands and Waters for Water Supply Purposes.' * * *

Joseph H. Gainer, Mayor of the City of Providence."

which plat was filed for record in the Town Clerk's office in said Scituate on December 6, 1916.

This parcel is subject to restrictions against the keeping of a store and the sale of intoxicating liquors on the premises as specified in the deed from Andrew A. Angell to Zerviah Aldrich dated November 29, 1832 and recorded in said Town Clerk's office in book 12, page 917.

CITY OF PROVIDENCE, WATER SUPPLY BOARD.
B. THOMAS POTTER.
WILLIAM P. VAUGHN.
JOSEPH H. GAINER.
HENRY A. GRIMWOOD.
WALTER F. SLADE.

45 Superior Court of the State of Rhode Island, &c., for the Counties of Providence and Bristol. Theresa B. Joslin vs. Walter L. Clarke, City Treasurer, et al. Equity No. —. Bill of Complaint. Robert H. McCarter, James Harris, Francis I. McCanna, Alfred G. Chaffee, Solicitors for Complainant.

46 EXHIBIT A.

City of Providence.

Statement Containing the Description of Lands, Waters, etc., Taken and Specifying the Title Therein Taken and Stating the Purposes for Which Taken by the City of Providence, Pursuant to Chapter 1278 *of the Public Laws of* 1915 *and by Resolution of the City Council Thereof.*

[SEAL.]

47 Statement of Lands and Estates, Easements, Rights, and Interests in Lands and Waters, Water Rights, and Privileges Condemned by the City of Providence under Chapter 1278 of the Public Laws, Passed at the January Session, A. D. 1915, and by Resolution of the City Council of said City Numbered 397 and Approved December Fourth, 1916.

Whereas, the City Council of the City of Providence, a municipal corporation in the State of Rhode Island, pursuant to Chapter 1278 of the Public Laws, entitled "An Act to Furnish the City of Providence with a Supply of Pure Water," passed by the General Assembly of said State at its January Session, A. D. 1915 and approved by the Governor of said State on April 21, 1915, and in exercise of the powers and authority conferred by said Act, passed its certain resolution numbered 397, approved December fourth, 1916, and entitled "Resolution of the City Council Taking Certain Lands and Waters for Water Supply Purposes," wherein and whereby said City of Providence elected to take and took certain lands, and estates, easements, rights and interests in lands, and waters, water rights and privileges therein described, and wherein were specified the nature or extent of the title therein or thereto taken and the purpose or purposes for which the same were taken, and which provided that there be filed in the office of the town or city clerk of each of the following towns and city, namely, the Town of Scituate, the Town of Foster, the Town of Johnston, the Town of Coventry, the Town of West Warwick, the Town of Warwick and the City of Cranston a statement, containing a description of the lands, and the estates, easements, rights and interests in lands, and the waters, water rights and privileges taken, and specifying the nature or extent of the title therein taken, and stating that the same are taken pursuant to the provisions of said Act, and stating the purpose
48 or purposes for which the same are taken thereunder, and also a plat of said lands the same to be a duplicate of the plat accompanying said resolution with the addition of the number and date of passage of said resolution and the signature of the Mayor thereon;

Now therefore, pursuant to said Act and said Resolution and in conformity therewith, said City of Providence makes the following Statement that it has elected to take and takes, and the same are

taken pursuant to the provisions of said Act, for the purpose or purposes hereinafter specified, all the lands, and estates, easements, rights and interests in lands, and waters, water rights and privileges, hereinafter described, and title therein of the nature or to the extent hereinafter specified, viz.:

First. All the lands and parcels of land, with any and all the improvements thereon, comprising or included within that certain tract or area of land, situated mostly in the Town of Scituate and in part in the Town of Foster and in part in the Town of Johnston in said State, lying or included within, and bounded and enclosed by, that certain line described as follows:

Beginning at a point in the northerly line of the Danielson Pike, so-called, in said Town of Scituate, at its intersection with the easterly line of the Road to Elmdale, so-called; thence northerly, in the easterly line of said Road to Elmdale, eleven hundred seven (1,107) feet more or less to the northwesterly corner of land now or formerly of Susan S. Aldrich; thence westerly crossing said Road to Elmdale, thirty-two (32) feet more or less to the northeasterly corner of land now or formerly of Irving H. Baker and wife; thence westerly in the northerly line of said Baker land, land now or formerly of Susan S. Aldrich and land now or formerly of John W. Coggeshall, thirteen hundred seventy-seven (1,377) feet more or less; thence southerly in the westerly line of said Coggeshall land, two hundred fifty-five (255) feet more or less; thence southwesterly in the northwesterly line of said Coggeshall land, seven hundred nineteen (719) feet more or less to a point in the northerly line of the said Danielson Pike; thence westerly in the northerly line of said Danielson Pike, five hundred fifty-seven (557) feet more or less; thence north seven (7) degrees, twenty-one (21) minutes west, crossing land now or formerly of Henrietta Angell and others, seven hundred sixteen (716) feet more or less to the southeasterly corner of a cemetery on land of said Angell; thence northerly in the easterly line of said cemetery eighty-eight (88) feet more or less; thence westerly in the northerly line of said cemetery, one hundred thirty-one (131)
49 feet more or less to a point in the easterly line of the Elmdale Cross Road, so-called; thence northerly in the easterly line of said Elmdale Cross Road, three hundred twenty (320) feet more or less to an angle in said road; thence continuing northerly in range with said easterly line and crossing said Elmdale Cross Road forty-two (42) feet more or less; thence north twelve (12) degrees, fifty-one (51) minutes east, crossing land of the City of Providence, formerly of Irving G. Spencer, the Hartford Pike, so-called, and land now or formerly of Susan A. Harris, three thousand one hundred ten (3,110) feet more or less to a point in the southerly line of Quaker Lane, so-called; thence easterly in the southerly line of said Quaker Lane and an extension of said line across the road leading northerly from Elmdale by the Rocky Hill school, three hundred seventy (370) feet more or less to the easterly line of said last mentioned road; thence northerly in the easterly line of said last men-

tion-d road, crossing the Rocky Hill road, so-called, two thousand six hundred five (2,605) feet more or less to the intersection of the northerly line of the said Rocky Hill road and the easterly line of the said road leading northerly from Elmdale by the Rocky Hill school; thence easterly in the northerly line of the said Rocky Hill road seventy-two (72) feet more or less; thence northerly in the easterly line of the Rocky Hill school lot, forty-eight (48) feet more or less; thence westerly in the northerly line of said school lot, sixty-five (65) feet more or less to the easterly line of the said road leading northerly from Elmdale; thence northerly in the easterly line of said last mentioned road one hundred five (105) feet more or less, to the southwesterly corner of a cemetery; thence easterly in the southerly line of said cemetery one hundred ninety-one (191) feet more or less; thence northerly in the easterly line of said cemetery sixty-two (62) feet more or less; thence westerly in the northerly line of said cemetery one hundred seventy-six (176) feet more or less to the easterly line of said road leading northerly from Elmdale; thence northerly in the easterly line of said last mentioned road, eight hundred ninety-nine (899) feet more or less to the southerly line of the road leading easterly by Harrisdale Pond, so-called; thence easterly in the southerly line of said last mentioned road, nine hundred fifty-two (952) feet more or less to the westerly line of the road leading southerly through Harrisdale; thence southerly in the westerly line of said last mentioned road, seven hundred thirteen (713) feet more or less to the northeasterly corner of land now or formerly of the North Scituate Cotton Mills; thence easterly crossing said last mentioned road twenty-nine (29) feet more or less to the southwesterly corner of land now or formerly of Asahel H. Harris Heirs; thence easterly in the southerly line of said Harris Heirs land and land now or formerly of Henry H. Slocum, nine hundred forty-one (941) feet more or less; thence southerly in the westerly line of land now or formerly of Harley T. Luther, six hundred twenty-eight (628) feet more or less; thence westerly in the northerly line of land now or formerly of William H. Knight, seven hundred twenty (720) feet more or less; thence northerly in the easterly line of land now or formerly of Ada E. Corey, and land now or formerly of Anna L. Corey, six hundred four (604) feet more or less; thence westerly in the northerly line of land of said Anna L. Corey forty (40) feet more or less to a point in the easterly line of the said road leading southerly through Harrisdale; thence westerly crossing said road thirty-three (33) feet more or less; thence southerly in the westerly line of said last mentioned road and continuing across the said Rocky Hill road one thousand nine hundred forty (1,940) feet more or less to a point in the southerly line of said Rocky Hill road; thence easterly in the southerly line of said road ten hundred thirty-eight (1,038) feet more or less to a point at the northwesterly corner of land now or formerly of Myra M. Peckham; thence southerly in the westerly line of said Peckham land, eleven hundred seventy-three (1,173) feet more or less to a point in the northerly line of land now or formerly of Benjamin F. Smith; thence south fifty-nine (59) degrees, thirty-eight

(38) minutes east, crossing land of said Smith, twelve hundred twenty-seven (1,227) feet more or less, to a point in the southerly line of said Smith land; thence easterly in the southerly line of said Smith land, two hundred (200) feet more or less to the southeasterly corner of said Smith land; thence south seventy-three (73) degrees, eight (8) minutes east, crossing land now or formerly of Rebecca Levin, seven hundred fifty (750) feet; thence north sixty-three (63) degrees, forty-five (45) minutes east, crossing said Levin land and the Greenville road, so-called, ten hundred sixty-two and eight-tenths (1,062.8) feet more or less to a point in the easterly line of said Greenville road; thence southerly in the easterly line of said Greenville road, five hundred twenty-six and four-tenths (526.4) feet more or less to a point in the northwesterly corner of land now or formerly of the North Scituate Cotton Mills; thence north thirty (30) degrees, twenty-four (24) minutes east, crossing land now or formerly of Benjamin F. Smith, ten hundred ninety-eight and one-tenth (1,098.1) feet; thence north fifty-four (54) degrees, thirty-seven (37) minutes east, crossing said Smith land and land now or formerly of W. S. Bennett Blanchard and others, three thousand one hundred fifty-eight and seven-tenths (3,158.7) feet more or less to the easterly line of said Blanchard land; thence northerly in the easterly line of said Blanchard land, eight hundred thirty (830) feet more or less; thence north five (5) degrees, seven (7) minutes west, crossing land now or formerly of John D. Blanchard and others, one hundred sixty-seven (167) feet more or less to a point in the southerly line of the aforementioned Greenville road; thence easterly in the southerly line of said Greenville road, nine hundred eighty-four (984) feet more or less to the northwesterly corner of a cemetery near the junction of said Greenville road with Winsor avenue, so-called; thence southerly in the westerly line of said cemetery, fifty-eight (58) feet more or less to the southwesterly corner
51 thereof; thence south twenty-seven (27) degrees, fifty (50) minutes east, crossing land of said John D. Blanchard and others, one thousand eight hundred sixty-one and one-tenth (1,861.1) feet more or less to a point at an angle in the westerly line of land now or formerly of Elisha A. Winsor; thence south nine (9) degrees, eight (8) minutes west, crossing said Elisha A. Winsor land and land now or formerly of William H. Watson, one thousand one hundred sixty-nine and two-tenths (1,169.2) feet; thence south thirty-five (35) degrees, thirty (30) minutes west, crossing said Watson land, seven hundred seventy-five (775) feet; thence south twenty-three (23) degrees, seven (7) minutes west, crossing said Watson land and land now or formerly of Willis S. Knowles Estate, nine hundred sixty-five (965) feet more or less to a point in the boundary line between the Towns of Scituate and Johnston; thence south three (3) degrees, forty-nine (49) minutes west in said boundary line, crossing land now or formerly of said Knowles Estate, land now or formerly of Edward Fontaine and land now or formerly of Pasquale Campanile, one thousand eight hundred forty (1,840) feet; thence south eighty (80) degrees, twenty-three (23) minutes west, crossing said Campanile land, land now or formerly

of Allen U. Barber and land now or formerly of Charles H. Davis, one thousand four hundred twenty-nine and two-tenths (1,429.2) feet; thence south sixty-two (62) degrees, fifteen (15) minutes west, crossing said Davis land four hundred ninety (490) feet more or less to a point in the northerly line of the before mentioned Hartford Pike; thence westerly in the northerly line of said Hartford Pike, crossing the said Greenville road, two thousand two hundred seventy-eight (2,278) feet more or less to a point at the intersection of the northerly line of the said Hartford Pike with the westerly line of the said Greenville road; thence southerly crossing said Hartford Pike and in the westerly line of said Greenville road, one thousand one and four-tenths (1,001.4) feet more or less to the northeasterly corner of a school lot, land of the Town of Scituate; thence westerly in the northerly line of said school lot and the Smithville Cemetery, seven hundred fifty-seven and three-tenths (757.3) feet more or less; thence southerly in the westerly line of said cemetery three hundred twelve and five-tenths (312.5) feet; thence north fifty-one (51) degrees, twenty-seven (27) minutes west, crossing land now or formerly of Adelbert L. Wood and wife, twenty-one and seven-tenths (21.7) feet; thence south twenty-eight (28) degrees, thirty (30) minutes west, crossing said Wood land forty (40) feet more or less; thence southerly partly in the westerly line of a passway leading to the Smithville Cemetery and partly in the westerly line of Silk Lane, so-called, two hundred sixty-one and nine-tenths (261.9) feet; thence north sixty-two (62) degrees, twenty-one (21) minutes west, crossing said Adelbert L. Wood and wife land, two hundred twenty-seven and eight-tenths (227.8) feet more or less; thence southerly in the westerly line of said Wood land, land now or formerly of
52 Mary A. Austin, land now or formerly of Effie Robinson and Estella C. Colvin, land now or formerly of Estella C. Colvin and land now or formerly of Emma B. Potter and E. Maud Kenyon, three hundred twenty-five and four-tenths (325.4) feet; thence north seventy-five (75) degrees, forty-two (42) minutes west, crossing land now or formerly of Daniel A. Clarke, Jr. and Charles K. Clarke, one hundred eighty-nine (189) feet; thence south thirty (30) degrees, seventeen (17) minutes west, crossing land of the City of Providence, formerly of David O. Chapman, forty (40) feet; thence southerly in the easterly line of said City of Providence land and crossing the before mentioned Danielson Pike, (in this locality sometimes called Main street), one hundred eight (108) feet more or less to a point in the southerly line of said Danielson Pike; thence westerly in the southerly line of said Danielson Pike, sixty-eight and two-tenths (68.2) feet to a point at the northwesterly corner of land now or formerly of Mary I. Winsor; thence southerly in the westerly line of said Winsor land, one hundred forty-eight (148) feet more or less; thence easterly in the southerly line of said Winsor land, land now or formerly of Sarah M. and Mary E. Snell and land now or formerly of Amey A. Smith, two hundred five (205) feet more or less to a point in the westerly line of land now or formerly of William F. Angell; thence southerly in the westerly line of said Angell land, sixty (60) feet more or less; thence south sixty-six (66)

degrees, twenty-six (26) minutes east, crossing said Angell land, a right of way now or formerly of William F. Angell and others and other land of said Angell, two hundred forty-six and three-tenths (246.3) feet more or less to a point at the southwesterly corner of land now or formerly of E. Gertrude Clarke; thence easterly in the southerly line of said Clarke land and land now or formerly of Daniel A. Clarke, Jr. and others, one hundred thirty-five and four-tenths (135.4) feet to a point at the southeasterly corner of said Daniel A. Clarke, Jr. and others land; thence south seventy-three (73) degrees, eight (8) minutes east, crossing other land of said E. Gertrude Clarke and land now or formerly of Susan A. Harris, one hundred seventy-six and six-tenths (176.6) feet more or less; thence easterly in the southerly line of other land of said Susan A. Harris, seventy-nine and seven-tenths (79.7) feet more or less to the southwesterly corner of land now or formerly of Lyman M. Smith and wife; thence south sixty-one (61) degrees, four (4) minutes east, crossing land now or formerly of William T. Smith and wife, sixty-six (66) feet more or less; thence south sixty-two (62) degrees twelve (12) minutes east, crossing said Smith land, sixty-eight and two-tenths (68.2) feet to the southwesterly corner of land now or formerly of Phebe A. and Elizabeth B. Boss; thence easterly in the southerly line of said Boss land, seventy-eight (78) feet more or less: thence south sixty (60) degrees, fifty-eight (58) minutes east, crossing land now or formerly of Everett W. Adams and wife, land now or formerly of Mercie A. Luther, land now or formerly of John D. Whipple and the North Scituate-Kent road, so-called, three
53 hundred twenty-one and nine-tenths (321.9) feet to a point in the easterly line of said North Scituate-Kent road; thence southerly in the easterly line of said North Scituate-Kent road, one hundred seventy and three-tenths (170.3) feet to a point at the southwesterly corner of land now or formerly of Chester L. Smith and others; thence easterly in the southerly line of said Smith land, six hundred fifty (650) feet more or less to the southeast corner of said Smith land; thence south eleven (11) degrees, forty-three (43) minutes west, three hundred ninety-four and five-tenths (394.5) feet; thence south sixty-one (61) degrees, thirty-two (32) minutes east, six hundred twenty-nine and three-tenths (629.3) feet; thence south ten (10) degrees, forty-three (43) minutes west, one hundred and seventy-six and one-tenth (176.1) feet; thence south eleven (11) degrees, forty (40) minutes east, nine hundred thirty-eight and one-tenth (938.1) feet more or less to a point at the northwesterly corner of land now or formerly of Albert J. Farrow, the last four (4) courses crossing land now or formerly of Edward P. and Cynthia A. H. Harris; thence southerly in the westerly line of said Albert J. Farrow land and the westerly line of land now or formerly of Walter J. Farrow, crossing the Brandy Brook road, so-called, one thousand three hundred fifty-seven (1,357) feet more or less to a point in the southerly line of said Brandy Brook road; thence easterly and southerly in the southerly and westerly line of said Brandy Brook road, two thousand two hundred eighty-four (2,284) feet more or less to the northeasterly corner of land now or formerly of

Louis W. Harris; thence westerly in the northerly line of said Harris land four hundred fifty-one (451) feet more or less; thence southerly in the westerly line of said Harris land four hundred eighty (480) feet more or less; thence easterly in the southerly line of said Harris land, one hundred twenty-eight (128) feet more or less; thence southerly in the westerly line of said Harris land and crossing the Saundersville Pike, so-called, three hundred eighty-five (385) feet more or less to a point in the southerly line of said Pike at the northwesterly corner of land now or formerly of Ethel S. Hanscom; thence southerly and westerly in the westerly and northerly line of said Hanscom land, nine hundred forty-five (945) feet more or less to a point in the easterly line of land now or formerly of Randall R. Hopkins; thence northerly in the easterly line of said Hopkins land and crossing said Saundersville Pike, one hundred sixty-six (166) feet more or less to a point in the northerly line of said Saundersville Pike; thence westerly in the northerly line of said pike, one thousand four hundred forty-one (1,441) feet more or less; thence southerly crossing said Saundersville Pike, fifty (50) feet more or less to the northwesterly corner of said Randall R. Hopkins land; thence southerly in the westerly line of said Hopkins land one hundred sixty-six (166) feet more or less; thence westerly in the northerly line of said Hopkins land, seventy-two (72) feet more or less; thence southerly in the westerly line of said
54 Hopkins land two hundred thirty (230) feet more or less; thence easterly in the southerly line of said Hopkins land crossing land now or formerly of Harriet F. Card and continuing in the southerly line of said Hopkins land, one thousand fifteen (1,015) feet more or less; thence southerly in the westerly line of said Hopkins land and land now or formerly of Charles H. Davis, six hundred seventy-three (673) feet more or less; thence westerly in line with said Davis land forty-eight (48) feet more or less; thence southerly in the westerly line of said Davis land and land now or formerly of Harrison T. Winsor, one thousand two hundred fifteen (1,215) feet more or less; thence westerly in the northerly line of land now or formerly of Olive G. Weeden, four hundred fifty-five (455) feet more or less; thence southerly in the westerly line of said Weeden land crossing the William T. Henry road, so-called, one thousand eight hundred seventy-nine (1,879) feet more or less to a point in the southerly line of said William T. Henry road at the northwesterly corner of land now or formerly of Jennie M. Peterson; thence southerly in the westerly line of said Peterson land crossing the Byron Randall road, so-called, one thousand two hundred forty-eight (1,248) feet more or less to a point in the southerly line of said Byron Randall road; thence easterly and southerly in the southerly and westerly line of said Byron Randall road, three thousand seven hundred two (3,702) feet more or less to the northeasterly corner of land now or formerly of George H. Howard; thence northerly crossing said Byron Randall road, thirty-seven (37) feet more or less to a point in the northerly line of said road at the southwesterly corner of land now or formerly of Alfred H. Williams; thence northerly in the easterly line of land now or formerly of

John O. Waterman Heirs, seven hundred sixty-eight (768) feet more or less; thence easterly in the southerly line of said Waterman land, six hundred thirty-nine (639) feet more or less, to a point in the westerly line of said Byron Randall road; thence southerly in the westerly line of said Byron Randall road, three hundred fifty (350) feet more or less; thence easterly crossing the said Byron Randall road, thirty-four (34) feet more or less to a point in the easterly line of said road at the southwesterly corner of other land of said John O. Waterman Heirs; thence easterly and northeasterly in the southerly and southeasterly line of said Waterman land, eight hundred forty-five (845) feet more or less to a point in the southerly line of said Byron Randall road; thence easterly in the southerly line of said road, eight hundred eight (808) feet more or less to the southwesterly corner of land now or formerly of Barnet Mistofsky; thence easterly in the southerly line of said Mistofsky land, three hundred eighty-six (386) feet more or less to the northwesterly corner of land now or formerly of Anthony H. Lotito and others; thence southerly in the westerly line of said Lotito land and land now or formerly of Sarah M. Sprague, three thousand four hundred twenty-six (3,426) feet more or less to a point in the westerly line of the Shun
55 Pike, so-called; thence southwesterly in the northwesterly line of said Shun Pike, one hundred (100) feet more or less; thence southerly, crossing said Shun Pike, continuing in the westerly line of said Sarah M. Sprague land and crossing the Plainfield Pike, so-called, seven hundred seventy-nine (779) feet more or less to a point in the southerly line of said Plainfield Pike at the northwesterly corner of land now or formerly of George W. Lovell Heirs; thence southerly in the westerly line of said Lovell land two hundred seventy (270) feet more or less; thence easterly in the southerly line of said Lovell land two hundred seventeen (217) feet more or less; thence southerly in the westerly line of said Lovell land three hundred forty-four (344) feet more or less; thence westerly in the northerly line of land now or formerly of Ezra H. Perry, six hundred fifty-four (654) feet more or less; thence northerly in line with said Perry land, crossing said Plainfield Pike, two hundred ninety-three (293) feet more or less to a point in the northerly line of said Plainfield Pike; thence westerly in the northerly line of said Plainfield Pike, one thousand seven hundred seventy and five-tenths (1,770.5) feet more or less to the southeasterly corner of land now or formerly of James B. McGinn; thence northerly in the easterly line of said McGinn land, nine hundred twenty-one (921) feet more or less; thence southwesterly in the northwesterly line of said McGinn land seventy-seven (77) feet more or less; thence westerly in the northerly line of land now or formerly of Fannie Bush, one thousand three hundred thirty-two (1,332) feet more or less to a point in the easterly line of the Clarke Potter road, so-called, at the northwesterly corner of said Bush land; thence northerly in the easterly line of said Clarke Potter road, one thousand six hundred seventeen (1,617) feet more or less; thence westerly crossing said road and running in the northerly line of land now or formerly of Mary Waterman and land now or formerly of Charles E. Kings-

ley, two thousand four hundred one (2,401) feet more or less; thence southerly in the westerly line of said Kingsley land, one thousand two hundred fifty-two (1,252) feet more or less; thence westerly in line with said Kingsley land one thousand one hundred two (1,102) feet more or less; thence southerly in the westerly line of said Kingsley land, seven hundred seventy-three (773) feet more or less; thence easterly in line with said Kingsley land one hundred ninety-eight (198) feet more or less; thence southerly in line with said Kingsley land and crossing said Plainfield Pike, three hundred seventy (370) feet more or less to a point in the southerly line of said Plainfield Pike; thence easterly in the southerly line of said Plainfield Pike, six hundred sixty-five (665) feet more or less to the northwesterly corner of land now or formerly of Fannie H. Irons; thence southerly in the westerly line of said Irons land, two hundred two (202) feet more or less; thence easterly in the southerly line of said Irons land, three hundred fourteen (314) feet more or less; thence northerly, easterly and northerly in line with
56 said Irons land, three hundred sixty (360) feet more or less to a point in the southerly line of said Plainfield Pike; thence easterly in the southerly line of said Plainfield Pike, fifteen (15) feet more or less to the northwesterly corner of land now or formerly of Elisha A. Waterman; thence southerly in the westerly line of said Waterman land, two thousand three hundred twenty-eight (2,328) feet more or less; thence easterly in the southerly line of said Waterman land, four hundred eighty-eight (488) feet more or less; thence northerly in the easterly line of said Waterman land eight hundred three (803) feet more or less to the southwesterly corner of land now or formerly of John Broadbent; thence easterly and northerly in the southerly and easterly lines of said Broadbent land, two thousand eight (2,008) feet more or less to land now or formerly of said Elisha A. Waterman; thence northerly in line with said Waterman land sixty-two (62) feet more or less; thence easterly in line with said Waterman land, five hundred forty-seven (547) feet more or less; thence north seventeen (17) degrees, thirty-nine (39) minutes west; crossing said Waterman land, four hundred forty-eight and five-tenths (448.5) feet to a point in the southerly line of said Plainfield Pike; thence easterly in the southerly line of said Plainfield Pike, eighty-one (81) feet more or less to the northwesterly corner of other land now or formerly of James B. McGinn; thence southerly, easterly, southerly, easterly and northerly in the westerly, southerly, westerly, southerly and easterly line of said McGinn land, two thousand five hundred four (2,504) feet more or less to a point in the southerly line of said Plainfield Pike; thence easterly in the southerly line of said Plainfield Pike, one thousand three hundred thirty-two (1,332) feet more or less to the northwesterly corner of land now or formerly of Olive B. F. Greene; thence southerly in the westerly line of said Greene land, one hundred fifty-nine (159) feet more or less; thence easterly in the southerly line of said Greene land, three hundred twenty-nine (329) feet more or less to said Ezra H. Perry land; thence southerly in the westerly line of said Perry land, one thousand one hundred seventy-

nine (1,179) feet more or less; thence in a general easterly and southerly direction in the general southerly and westerly line of said Perry land, one thousand six hundred forty-seven (1,647) feet more or less to the northwesterly corner of land now or formerly of Susannah Y. Hawkins Heirs; thence southerly in the westerly line of said Hawkins land, eight hundred twenty-three (823) feet more or less to a point in the northerly line of land now or formerly of Isaac N. Mumford; thence westerly, southerly and westerly in line of said Mumford land, crossing the Betty Pond road, so-called, one thousand seven hundred ten (1,710) feet more or less to the northeasterly corner of land now or formerly of John B. W. Greene; thence southerly in the westerly line of said Betty Pond road, eight hundred thirty-seven (837) feet more or less; thence south sixty-two (62) degrees, seven (7) minutes west crossing said John B. W. Greene land one hundred fifty-seven and eight-tenths
57 (157.8) feet more or less to the northeasterly corner of land now or formerly of Henry A. Lawton; thence southerly in the westerly line of said John B. W. Greene land, eight hundred fifty-eight (858) feet more or less; thence south five (5) degrees, twenty-one (21) minutes west, crossing other land now or formerly of said Henry A. Lawton, seven hundred twenty-one and five-tenths (721.5) feet more or less; thence southerly in the westerly line of said John B. W. Greene land, two thousand nine hundred fifty-five (2,955) feet more or less to the northeasterly corner of land now or formerly of Ebenezer Kelley Heirs; thence westerly in the northerly line of said Kelley land, thirty-three (33) feet more or less; thence southerly in the westerly line of said Kelley land two hundred ten (210) feet more or less to the corner of land now or formerly of John C. Smith; thence southwesterly in the northwesterly line of said Smith land, seven hundred fifty-five (755) feet more or less; thence westerly in the northerly line of said Smith land, one hundred forty-seven (147) feet; thence south fifty-three (53) degrees, three (3) minutes west, crossing said Smith land and the Bald Hill road, so-called, four hundred ten (410) feet to a point in the westerly line of said Bald Hill road; thence southerly in the westerly line of said Bald Hill road, two hundred thirty (230) feet more or less; thence south thirty-five (35) degrees, four (4) minutes east, crossing other land now or formerly of said John C. Smith, one thousand two hundred sixteen (1,216) feet more or less to the northwesterly corner of land now or formerly of George A. Wyman; thence in a general southerly direction in the westerly line of said Wyman land, two thousand one hundred seventy-nine (2,179) feet more or less; thence westerly in the southerly line of land now or formerly of Hannah M. and Harden I. Fiske, five hundred sixteen (516) feet more or less; thence southerly in the easterly line of said Fiske land, seven hundred eighty-seven (787) feet more or less; thence in a general westerly direction in the southerly line of said Fiske land two thousand three hundred eighty-four (2,384) feet more or less; thence north nine (9) degrees, twenty-one (21) minutes west, crossing said Fiske land, one thousand four hundred forty-three and three-tenths (1,443.3) feet; thence south sixty (60)

degrees, fifteen (15) minutes west, seven hundred seven (707) feet, crossing said Fiske land to a point in the easterly line of the Kent-Hope East Road, so-called; thence westerly crossing said road, thirty-one (31) feet more or less to the southeasterly corner of land of the City of Providence, formerly of Edgar S. Yeaw and wife; thence northerly in the westerly line of said Kent-Hope East Road, ninety-five and seven-tenths (95.7) feet; thence south sixty-five (65) degrees, thirty-seven (37) minutes west, crossing said land formerly of said Yeaw, seventy-five (75) feet; thence north forty-one (41) degrees, twenty-six (26) minutes west, crossing said land formerly of said Yeaw and other City of Providence land, formerly of John W. Powell and wife, five hundred forty-three and seven-
58 tenths (543.7) feet; thence north eighty-four (84) degrees, fifty (50) minutes west, in the northerly line of said land formerly of said Powell, four hundred (400) feet; thence south six (6) degrees, ten (10) minutes west, crossing said land formerly of said Powell and said land formerly of said Yeaw, four hundred six and five-tenths (406.5) feet to a point in the northerly line of other land now or formerly of said Hannah M. and Harden I. Fiske; thence westerly in the northerly line of said Fiske land eight hundred thirty-seven (837) feet more or less to a point in the center of the Pawtuxet river, so-called; thence southerly with the center of said river in the westerly line of said Hannah M. and Harden I. Fiske land, one thousand nine hundred (1,900) feet more or less to a point in the river at the northeasterly corner of land now or formerly of Frank W. Howard and wife; thence westerly in the northerly line of said Howard land, four hundred forty (440) feet more or less, to a point in the easterly line of the Kent-Hope West Road, so-called, at the northwesterly corner of said Howard land; thence northerly in the easterly line of said Kent-Hope West Road, one thousand sixty (1,060) feet more or less; thence westerly crossing said road, forty (40) feet more or less to the westerly line of said Kent-Hope West Road at the northeasterly corner of land now or formerly of George P. Howard; thence westerly in the northerly line of said George P. Howard land, one thousand two hundred eighty-three (1,283) feet more or less; thence north seventeen (17) degrees, nine (9) minutes west, crossing land now or formerly of Asa E. Colvin, the Burnt Hill road, so-called, and land of the City of Providence, formerly of Arthur S. Field, one thousand six hundred forty-four and three-tenths (1,644.3) feet; thence south seventy-two (72) degrees, fifty-one (51) minutes west, crossing land formerly of said Field, land of said Asa E. Colvin and land now or formerly of John C. Smith, two thousand six hundred eighty-seven and six-tenths (2,687.6) feet to a point in the southerly line of said John C. Smith land; thence westerly in the southerly line of said Smith land, eight hundred fifty (850) feet more or less to the northwesterly corner of land now or formerly of Emery Walker and wife; thence southerly in the westerly line of said Emery Walker and wife land, one hundred nineteen (119) feet more or less; thence south seventy-two (72) degrees, fifty-one (51) minutes west, crossing land of the City of Providence, formerly of Lyman A. Knight, and

land of the City of Providence, formerly of Frank M. Knight, three thousand one hundred fifteen and five-tenths (3,115.5) feet more or less; thence northwesterly through land of said City of Providence, formerly the easterly boundary of said Lyman A. Knight land, seven hundred ten (710) feet more or less; thence north twelve (12) degrees, fifty-one (51) minutes east, crossing said land formerly of Frank M. Knight, the Kent-Coventry road, so-called and other land of the City of Providence, formerly of Lyman A. Knight, two thousand seven hundred sixty-four and four-tenths (2,764.4) feet more or less to a point in the southerly line
59 of land now or formerly of Sylvania Whitman and Benjamin F. Whitman; thence easterly in the southerly line of said Whitman land and crossing the Tunk Hill road, so-called, one thousand five hundred thirty-seven (1,537) feet more or less to a point in the northerly line of said Tunk Hill road; thence northerly in the easterly line of said road two hundred eighty (280) feet more or less; thence westerly, crossing said road thirty-three (33) feet more or less to the northeast corner of said Whitman land; thence westerly and northerly in line with said Whitman land eight hundred twenty-five and six-tenths (825.6) feet more or less to a point in the southerly line of said Tunk Hill road; thence northerly, crossing said road and continuing in the easterly line of other land of said Sylvania Whitman and Benjamin F. Whitman, two thousand eighty-six (2,086) feet more or less; thence easterly in the line of said Whitman land ninety-five and five-tenths (95.5) feet, more or less; thence northerly in the line of said Whitman land five hundred ninety-seven (597) feet more or less; thence easterly in the southerly line of other land of said Sylvania and Benjamin F. Whitman, one thousand three hundred (1,300) feet more or less; thence northerly in the easterly line of said Whitman land and land now or formerly of Amy Angell Heirs, one thousand two hundred ninety-three (1,293) feet more or less to the southwesterly corner of land now or formerly of Hannah M. and Harden I. Fiske; thence easterly in the southerly line of said Fiske land, six hundred sixty (660) feet more or less; thence northerly in the easterly line of said Fiske land, six hundred sixty (660) feet more or less; thence westerly in the northerly line of said Fiske land, land now or formerly of said Amy Angell Heirs, land now or formerly of the Scituate Light and Power Company and land now or formerly of John C. Smith, two thousand six hundred forty (2,640) feet more or less; thence northerly in the easterly line of said Smith land, six hundred thirty-eight (638) feet more or less; thence northeasterly in line of land now or formerly of William W. Knight, four hundred ten (410) feet more or less; thence westerly in the northerly line of said Knight land and land now or formerly of Benjamin H. Shippee, one thousand five hundred sixty-seven (1,567) feet more or less to the southeasterly corner of land now or formerly of Elizabeth J. Wilbur; thence northerly in the easterly line of said Wilbur land, eight hundred seventy-seven (877) feet more or less; thence westerly in the northerly line of said Wilbur land, three hundred twenty (320) feet more or less, to a point in the easterly line of the afore-

mentioned Tunk Hill road; thence northerly in the easterly line of said Tunk Hill road, crossing the aforementioned Plainfield Pike six hundred thirty-five (635) feet more or less to a point in the northerly line of said Plainfield Pike; thence westerly in the northerly line of said Pike eight hundred thirty-five (835) feet more or less to the southwesterly corner of land of the City of Providence, formerly of Elizabeth O. Salisbury; thence southerly crossing said Plainfield Pike ninety-five (95) feet more or less to the northwesterly corner of land now or formerly of James F. Hervey; thence southerly in the westerly line of said Hervey land one hundred fifty-nine (159) feet more or less; thence easterly in the southerly line of said Hervey land, two hundred sixty-nine (269) feet more or less; thence north seventy-seven (77) degrees, forty-seven (47) minutes east, crossing land now or formerly of Benjamin Wilbur and others, forty-one and nine-tenths (41.9) feet; thence south seventy-eight (78) degrees, thirty-nine (39) minutes east, crossing said Wilbur land two hundred seventy-five (275) feet more or less; thence southerly in the westerly line of land now or formerly of Elizabeth J. Wilbur, seven hundred ninety (790) feet more or less; thence westerly in line with said Wilbur land, the northerly line of land now or formerly of Wilson E. Barden, land now or formerly of Ezra R. Knight and wife, eight hundred ninety-four (894) feet more or less; thence southerly in the westerly line of said Knight land two hundred eighty and five-tenths (280.5) feet; thence north seventy-five (75) degrees, five (5) minutes west, crossing land of said Benjamin Wilbur and others, one thousand two hundred two and five tenths (1,202.5) feet more or less to a point in the southerly line of said Plainfield Pike; thence easterly in the southerly line of said Plainfield Pike, one thousand four hundred thirty-two (1,432) feet more or less to the northwesterly corner of land of the City of Providence, formerly of Benjamin Wilbur; thence northerly crossing said Plainfield Pike fifty-seven and three-tenths (57.3) feet more or less to a point in the northerly line of said Plainfield Pike at the southeasterly corner of land now or formerly of Philip Almy; thence in a general northerly direction in the easterly line of said Almy land two thousand three hundred seventy-two (2,372) feet more or less to the southeasterly corner of land now or formerly of Leonard R. Field and others; thence northerly in the easterly line of said Field land crossing Fields Hill road, so-called, seven hundred ninety (790) feet more or less, to a point in the northerly line of said Fields Hill road; thence north fourteen (14) degrees, fifty-four (54) minutes east, crossing other land now or formerly of said Leonard R. Field and others two hundred fifty (250) feet; thence north thirty-eight (38) degrees, seven (7) minutes west, crossing said Field land, two thousand eight hundred seven and eight-tenths (2,807.8) feet more or less to the northeasterly corner of land now or formerly of Mary Malbourne Heirs; thence westerly in the northerly line of said Malbourne land six hundred ten (610) feet more or less; thence northerly in line with said Malbourne land four hundred sixty-five (465) feet more or less; thence southwesterly in line with said Malbourne land seven hun-

dred sixty-nine (769) feet more or less; thence westerly in line with said Malbourne land and the northerly line of land now or formerly of Amedeo Sabatini and others, one thousand five (1,005) feet more or less; thence northerly in line with said Sabatini land one hundred forty-eight (148) feet more or less; thence westerly
61 in line with said Sabatini land one hundred ninety-seven (197) feet more or less to a point in the easterly line of the George P. King road, so-called; thence northerly in the easterly line of said road ninety-eight (98) feet more or less; thence westerly crossing said George P. King road and continuing in the northerly line of other land now or formerly of said Amedeo Sabatini and others, seven hundred fifty-three (753) feet more or less; thence southerly in the westerly line of said Sabatini land, two hundred fifty-eight (258) feet more or less to the northerly line of said George P. King road; thence westerly in the northerly line of said road, one hundred fifty (150) feet more or less; thence westerly in the northerly line of other land now or formerly of said Amedeo Sabatini and others, three hundred fifty-seven (357) feet more or less; thence southerly in the westerly line of said Sabatini land, three hundred thirty-eight (338) feet more or less to a point in the northerly line of said George P. King road; thence westerly in the northerly line of said road twenty-one (21) feet more or less; thence westerly in the northerly line of land now or formerly of Charles O. Angell one thousand two hundred eighty-two (1,282) feet more or less; thence in a general northerly direction in the easterly line of land now or formerly of Max L. Kramer and wife, land now or formerly of Fred Brusby and wife, and land now or formerly of John H. Comstock and wife two thousand five hundred twelve (2,512) feet more or less; thence westerly in the northerly line of said Comstock land and the northerly line of land now or formerly of John Greenwood and wife nine hundred twenty (920) feet more or less to a point in the easterly line of the Knight Hill road, so-called; thence northerly in the easterly line of said Knight Hill road, crossing the Rockland-Clayville road, so-called, one thousand ninety-seven (1,097) feet more or less to a point in the northerly line of said Rockland-Clayville road; thence westerly in the northerly line of said road eighty-five and four-tenths (85.4) feet to the southeasterly corner of land now or formerly of Otis W. Paine and wife; thence northerly in the easterly line of said Paine land one hundred sixty-five (165) feet more or less; thence westerly in the northerly line of said Paine land one hundred thirty-two (132) feet more or less; thence southerly in the westerly line of said Paine land one hundred fifty-nine (159) feet more or less to a point in the northerly line of said Rockland-Clayville road; thence westerly in the northerly line of said road four hundred sixty-four (464) feet more or less to the southeasterly corner of land now or formerly of Albert Bassett and wife; thence northerly in the easterly line of said Bassett land three hundred eighteen (318) feet more or less; thence south sixty-five (65) degrees, eighteen (18) minutes west, crossing land of said Bassett and land now or formerly of William L. Round and wife, four hundred seventy-seven (477) feet more or less to the north-

easterly corner of land now or formerly of John H. and Harry H. Luther; thence westerly in the northerly line of said Luther land ninety-eight (98) feet more or less; thence southerly in
62 the westerly line of said Luther land, crossing said Rockland-Clayville road three hundred thirty-two (332) feet more or less, to a point in the southerly line of said Rockland-Clayville road; thence easterly in the southerly line of said road one thousand twenty (1,020) feet more or less, to the northwesterly corner of land now or formerly of Charles M. Warner Heirs; thence southerly in the westerly line of said Warner land two hundred seventy-one (271) feet more or less: thence southerly in the westerly line of land now or formerly of Henry K. Luther and The Joslin Manufacturing Company nine hundred eighty-one (981) feet more or less to the northeasterly corner of land now or formerly of Arthur C. Rounds; thence westerly in the northerly line of said Rounds land three hundred eighty-six (386) feet more or less to land now or formerly of Orrison Cole; thence northwesterly and southwesterly in line with said Cole land one thousand two hundred ninety-one (1,291) feet more or less to the southeasterly corner of land now or formerly of Leon B. Pierce; thence northerly in the easterly line of said Pierce land and land now or formerly of John A. Round and wife, three hundred forty-four (344) feet more or less; thence westerly crossing the aforementioned Fields Hill road two hundred twenty-six (226) feet more or less to a point in the westerly line of said Fields Hill road; thence southerly in the westerly line of said road four hundred thirty (430) feet more or less to the northwesterly corner of land now or formerly of Alwilda Pierce; thence southwesterly in the northwesterly line of said Pierce land four hundred fifteen (415) feet more or less; thence south seventeen (17) degrees, thirty-one (31) minutes west, crossing land now or formerly of Delphine Ducharme and land now or formerly of Harriet A. Hill one thousand five hundred ninety-four and one-tenth (1,594.1) feet; thence south twenty-six (26) degrees, fifty-eight (58) minutes west, crossing land now or formerly of said Harriet A. Hill, land now or formerly of Jennie M. Lillibridge, other land now or formerly of Harriet A. Hill, land now or formerly of Herbert H. Taylor, land now or formerly of Maria A. Sayles, land now or formerly of Bogardus F. Hyde and land now or formerly of Byron M. Lewis, seven thousand three hundred twelve and three tenths (7,312.3) feet more or less to a point in the northerly line of the aforementioned Plainfield Pike; thence westerly in the northerly line of said pike one thousand one hundred twelve (1,112) feet more or less to the intersection of the northerly line of said Plainfield Pike with the easterly line of the Isthmus road, so-called; thence in a general northerly direction in the easterly line of said Isthmus road ten thousand eight hundred seventy-six (10,876) feet more or less; thence south eighty-three (83) degrees, fifty-four (54) minutes east, crossing land now or formerly of Brayton A. Round six hundred ten and nine-tenths (610.9) feet more or less to the southwesterly corner of land now or formerly of Maria A. Sayles; thence easterly in the southerly line of said Sayles land one hun-

dred forty-six (146) feet more or less to the southeasterly
63 corner of said Sayles land; thence south fifty-four (54) degrees, forty-nine (49) minutes east, crossing land now or formerly of Mary S. Phillips and land now or formerly of George H. Burgess four hundred (400) feet more or less; thence north fifty-three (53) degrees, fifty-seven (57) minutes east, crossing said Burgess land seven hundred forty-seven and nine-tenths (747.9) feet more or less to the southeasterly corner of land now or formerly of Isaac H. Jocey; thence northerly in the easterly line of said Jocey land one hundred six (106) feet more or less, to the southwesterly corner of land now or formerly of Ida M. Webster; thence easterly in the southerly line of said Webster land and land now or formerly of George H. Burgess and wife and land now or formerly of Lafayette Lodge No. 42, I. O. O. F., one hundred seventy-three (173) feet more or less; thence northerly in the easterly line of said land of Lafayette Lodge one hundred seventy-four (174) feet more or less to the northeasterly corner of said land in the southerly line of the Clayville-Foster Center road, so-called; thence easterly in the southerly line of said Clayville-Foster Center road one hundred (100) feet more or less; thence northerly in the range of the easterly line of the said Rockland-Clayville road, crossing said Fields Hill road and continuing in the easterly line of the said Rockland-Clayville road, three hundred ninety-five (395) feet more or less; thence westerly crossing said Rockland-Clayville road and continuing westerly in the northerly line of Pleasant Lane, so-called, two hundred twenty-six (226) feet more or less to the southeasterly corner of land now or formerly of Minnie S. Phillips; thence northerly in the easterly line of said Phillips land two hundred sixty (260) feet more or less; thence easterly in the southerly line of land now or formerly of Mary A. H. Pierce and land now or formerly of Alwilda Pierce, two hundred sixty-one (261) feet more or less to a point in the westerly line of said Rockland-Clayville road; thence crossing said road thirty-four (34) feet more or less to a point in the easterly line of said road at the southwesterly corner of land now or formerly of the Providence and Danielson Railway Company; thence easterly in the southerly line of said Railway Company's land ninety-nine (99) feet more or less; thence northerly in the easterly line of said land seventy-six (76) feet more or less; thence westerly in the northerly line of said land ninety-eight (98) feet more or less to a point in the easterly line of said Rockland-Clayville road; thence northerly in the easterly line of said road one hundred twenty-four (124) feet more or less to the southwesterly corner of land now or formerly of Leon B. Pierce; thence easterly in the southerly line of said Pierce land sixty-two (62) feet more or less; thence northerly in the easterly line of said Pierce land eighty-three (83) feet more or less; thence westerly in the northerly line of said Pierce land seventy (70) feet more or less, to a point in the easterly line of said Rockland-Clayville road; thence northerly in the easterly line of said road five hundred eleven (511) feet more or less to the northwesterly corner of land now or
64 formerly of Rhoda M. King and others; thence crossing said Rockland-Clayville road sixty (60) feet more or less to a

point in the northerly line of said road, at the southeasterly corner of the Providence and Danielson Railway Company's location; thence westerly in the northerly line of said road thirty-eight (38) feet more or less to the northeasterly corner of land now or formerly of John H. Luther; thence westerly in the northerly line of said Luther land four hundred sixteen (416) feet more or less; thence northerly in the easterly line of land now or formerly of John H. and Harry H. Luther five hundred and thirty-five (535) feet more or less to Bear Tree Brook, so-called; thence north thirty-two (32) degrees, four (4) minutes west, crossing land now or formerly of Mercie A. Wells three hundred seventy and eight-tenths (370.8) feet; thence north eighty-nine (89) degrees, seventeen (17) minutes east, crossing said Wells land two hundred thirty (230) feet; thence south no (0) degrees, forty-three (43) minutes west, crossing said Wells land one hundred fifty (150) feet; thence south sixty-three (63) degrees, forty-nine (49) minutes east, crossing said Wells land three hundred twenty-eight and seven-tenths (328.7) feet; thence south eighty-two (82) degrees, fifty-two (52) minutes east, crossing said Wells land one hundred seventy-one and two-tenths (171.2) feet to the location of said Providence and Danielson Railway Company; thence easterly in the northerly line of said location three hundred and three-tenths (300.3) feet; thence north four (4) degrees, thirty-two (32) minutes west, crossing said Wells land three hundred twenty-one (321) feet; thence north thirty-two (32) degrees, two (2) minutes west, crossing said Wells land two hundred thirty and three-tenths (230.3) feet; thence north forty-five (45) degrees, forty-one (41) minutes west, crossing said Wells land three hundred fifty-seven and nine-tenths (357.9) feet; thence south eighty-seven (87) degrees, fifty-eight (58) minutes east, crossing said Wells land six hundred forty-three and four-tenths (643.4) feet more or less to a point in the easterly line of said Mercie A. Wells land; thence northerly in the easterly line of said Wells land nine hundred seventy (970) feet more or less to the northeasterly corner of said Wells land; thence easterly in the southerly line of land now or formerly of Daniel H. Remington two hundred twelve (212) feet more or less to the southeasterly corner of said Remington land; thence northerly in the easterly line of said Remington land, land of the Barden Reservoir Company and crossing Hemlock road, so-called, one thousand two hundred sixty-seven (1,267) feet more or less to a point in the northerly line of said Hemlock road; thence westerly in the northerly line of said Hemlock road four thousand seven hundred fifty (4,750) feet more or less to a point at the southeasterly corner of land now or formerly of Eliza A. Barden and others; thence northerly in the easterly line of said Barden land five hundred seventy (570) feet more or less; thence north fifty-eight (58) degrees, thirty-nine (39) minutes west, crossing said Barden land nine hundred ninety-five and nine-tenths (995.9) feet more or less to a point in the easterly line of land now or formerly of Willard J. Hopkins; thence westerly in line with said Hopkins land eight hundred twenty-four (824) feet more or less; thence northerly in line with said Hopkins land eight hundred (800) feet more or less; thence

westerly in line with said Hopkins land one hundred ten (110) feet more or less to a point in the easterly line of the Clayville-Hopkins Mills road, so-called; thence northerly in the easterly line of said road two thousand nine hundred forty (2,940) feet more or less, to the southerly line of the aforementioned Saundersville Pike; thence easterly in the southerly line of said pike three hundred twenty-six (326) feet more or less; thence northerly crossing said Saundersville Pike and continuing in the easterly line of said Clayville-Hopkins Mills road two thousand one hundred fifty (2,150) feet more or less to the southwesterly corner of land now or formerly of Edith Barden; thence easterly in the southerly line of said Barden land seven hundred sixteen (716) feet more or less; thence south seventy-seven (77) degrees, nine (9) minutes east, crossing land now or formerly of George A. Wetherbee, land now or formerly of the Barden Reservoir Company, and land now or formerly of Lucy A. Smith one thousand three hundred seventy-eight and five-tenths (1,378.5) feet; thence south twenty-nine (29) degrees, one (1) minute east, crossing said Lucy A. Smith land one thousand six hundred forty-three and two-tenths (1,643.2) feet more or less to a point in the northerly line of the said Saundersville Pike; thence south ten (10) degrees, forty-eight (48) minutes east, crossing said Saundersville Pike, land now or formerly of Peter King, Jr. and land now or formerly of Israel P. Round, two thousand eight hundred seventy-two and eight-tenths (2,872.8) feet more or less, to a point in the northwesterly line of land now or formerly of Rhoda E. Briggs; thence south fifty (50) degrees forty-nine (49) minutes east, crossing said Briggs land and land now or formerly of Eliza A. Barden and others one thousand four hundred seventy and six-tenths (1,470.6) feet more or less to the northwesterly corner of a cemetery; thence southerly in the westerly line of said cemetery one hundred twenty-seven (127) feet more or less; thence easterly in the southerly line of said cemetery ninety-nine (99) feet more or less to a point in the westerly line of the Hopkins Mills road, so-called; thence southerly and easterly in the westerly and southerly line of said road two thousand four hundred ninety-four (2,494) feet more or less; thence northerly crossing said Hopkins Mills road thirty-three (33) feet more or less to a point in the northerly line of said road at the southwesterly corner of other land now or formerly of Eliza A. Barden and others; thence easterly in the southerly line of said Barden land four hundred eighty-eight (488) feet more or less; thence northerly in the easterly line of said Barden land one hundred two (102) feet; thence north fifty-seven (57) degrees, fifty-one (51) minutes east, crossing land now or formerly of Frank and Kate Carr and land now or formerly of Sarah D. Wells,
66 one thousand two hundred thirteen and two-tenths (1,213.2) feet, to a point in the center of Swamp Brook, so-called; thence south seventy-seven (77) degrees, nine (9) minutes east, crossing said Wells land, land now or formerly of the Scituate Light and Power Company and land of the City of Providence, formerly of James R. Moore and wife, three thousand three hundred eighty-eight and

seven-tenths (3,388.7) feet more or less to a point in the westerly line of land now or formerly of Robert and Mary Rhodes; thence southerly in line with said Rhodes land two hundred and three (203) feet more or less to a point in the westerly line of the Chopmist Hill road, so-called; thence easterly crossing said road thirty-three (33) feet more or less; thence northerly in the easterly line of said Chopmist Hill road two hundred ten (210) feet more or less; thence south seventy-seven (77) degrees, nine (9) minutes east, crossing land of the City of Providence, formerly of James R. Moore and wife, one thousand seven hundred fifteen and nine-tenths (1,715.9) feet more or less to a point in the westerly line of land now or formerly of Benjamin and Phebe B. Wood; thence southerly in the westerly line of said Wood land six hundred seventy-four (674) feet more or less; thence easterly in the southerly line of said Wood land one thousand four hundred ninety-one (1,491) feet more or less to the southwesterly corner of land now or formerly of Emanuel Hopkins and wife; thence easterly in the southerly line of said Hopkins land two hundred forty-four (244) feet; thence south thirty-two (32) degrees, forty-three (43) minutes east, crossing land now or formerly of Ora O. Hill, five hundred five and one-tenth (505.1) feet more or less to the westerly line of land now or formerly of Oscar R. Blackmar; thence southerly in the westerly line of said Blackmar land five hundred fifty-seven (557) feet more or less to a point in said westerly line six hundred eighty-seven (687) feet northerly from the northerly line of the Ashland-Ponaganset road, so-called, measured in the westerly line of said Blackmar land; thence south seventy-nine (79) degrees, forty-eight (48) minutes east, one hundred thirty-eight and eight-tenths (138.8) feet; thence north thirty-four (34) degrees, seventeen (17) minutes east, one hundred twelve and four-tenths (112.4) feet; thence south forty-six (46) degrees, fifty-nine (59) minutes east, two hundred twenty and eight-tenths (220.8) feet; thence south twenty-seven (27) degrees, seven (7) minutes west, three hundred eighteen and four-tenths (318.4) feet; thence south seventy (70) degrees, six (6) minutes east, one hundred thirty-one and three-tenths (131.3) feet; thence south thirty (30) degrees, twelve (12) minutes west, one hundred thirty-one and nine-tenths (131.9) feet; the last six (6) courses crossing said Oscar R. Blackmar land; thence south twenty-one (21) degrees, thirty-eight (38) minutes west, crossing said Blackmar land and the said Ashland-Ponaganset road to a point in the southerly line of said road two hundred seventy-six and one-tenth (276.1) feet more or less; thence easterly in the southerly line of said Ashland-Ponaganset road

67 one thousand six hundred thirty-one (1,631) feet more or less, to the northwesterly corner of land now or formerly of James A. Barden; thence southerly in the westerly line of said Barden land nine hundred (900) feet; thence south eighty (80) degrees, twenty-seven (27) minutes east, crossing said Barden land nine hundred fifty-five and seven tenths (955.7) feet more or less to the northwesterly corner of land now or formerly of Daniel H. Remington; thence easterly in the southerly line of said James A. Barden land nine hundred twenty-two (922) feet more or less; thence easterly in line

with land now or formerly of James A. Hopkins four hundred sixty (460) feet more or less; thence southerly in line with said Hopkins land three hundred thirty (330) feet more or less; thence easterly in line with said Hopkins land and land now or formerly of Auldis E. Barden, crossing the Wilbur Hollow road, so-cal'ed, and continuing in line with other land of said Barden, one thousand three hundred ninety-one (1,391) feet more or less; thence southerly in the westerly line of said Barden land two hundred fifty-three (253) feet more or less; thence westerly crossing said Wilbur Hollow road thirty (30) feet more or less; thence southerly in the westerly line of said road seven hundred twenty-two (722) feet more or less; thence easterly crossing said Wilbur Hollow road and continuing in the southerly line of land of said Auldis E. Barden four thousand one hundred six (4,106) feet more or less; thence northerly in the easterly line of said Barden land one thousand twenty (1,020) feet more or less to a point in the southerly line of said Ashland-Ponaganset road; thence easterly in the southerly line of said road one hundred eighty (180) feet more or less; thence north two (2) degrees, fifty-one (51) minutes east, crossing said Ashland-Ponaganset road and land of the City of Providence, formerly of Eloi La Coste and wife, four hundred forty-five (445) feet more or less; thence easterly in the southerly line of land now or formerly of Henry B. Salisbury ninety-three (93) feet more or less; thence southerly in line with said Salisbury land seventy-four (74) feet more or less; thence easterly in line with said Salisbury land thirty-three (33) feet more or less; thence northerly in the easterly line of said Salisbury land eight hundred eighty-one (881) feet more or less; thence easterly in line with land now or formerly of Cassius L. Ramsdell one hundred forty-one (141) feet more or less; thence northerly in line with said Ramsdell land two hundred sixteen (216) feet more or less; thence westerly in line with said Ramsdell land one hundred seventy-one (171) feet more or less; thence northerly in line with said Ramsdell land one thousand thirty-five (1,035) feet more or less; thence westerly in line with said Ramsdell land two hundred sixty-two (262) feet more or less, thence north two (2) degrees, fifty-one (51) minutes east, crossing land now or formerly of Fred Longbottom and others, land now or formerly of John R. Mathewson Heirs, land of the City of Providence,

68 formerly of Charles Parker and wife, land of the City of Providence, formerly of Fred A. and Byron W. Page, and land of the City of Providence, formerly of Andrew H. Andersonson, two thousand nine hundred thirty-five (2,935) feet more or less; thence easterly in the southerly line of land now or formerly of Alfred H. Lake six hundred thirty (630) feet more or less; thence northerly in the easterly line of said Lake land one thousand three hundred twenty (1,320) feet more or less; thence westerly in the northerly line of said Lake land two hundred sixty-four (264) feet more or less; thence north twenty-eight (28) degrees, twenty-six (26) minutes east, crossing said City of Providence land, formerly of Andrew H. Anderson, one thousand nine hundred seventy-seven (1,977) feet more or less; thence southerly in line of land now or formerly of George F. Aldrich devisees, two hundred sixty-four (264)

feet more or less; thence easterly in the southerly line of said Aldrich land eight hundred twenty-one (821) feet more or less; thence northerly in the easterly line of said Aldrich land one thousand two hundred thirty (1,230) feet more or less; thence westerly in line with said Aldrich land one hundred twenty-five (125) feet more or less; thence northerly in line with said Aldrich land two hundred nine (209) feet more or less; thence north twenty-eight (28) degrees, twenty-six (26) minutes east, crossing land of the City of Providence, formerly of Arthur W. Steere, and continuing to a point in the aforementioned Saundersville Pike six hundred sixty-nine and two-tenths (669.2) feet; thence north twelve (12) degrees, fifty-one (51) minutes east, crossing said pike and other land of the City of Providence, formerly of Arthur W. Steere, ninety-five (95) feet to a point in the southerly line of land now or formerly of Willis J. Boss; thence easterly in the southerly line of said Boss land, crossing said Saundersville Pike and continuing in said southerly line and crossing the Battey Meeting House road, so-called, nine hundred ninety-eight (998) feet more or less; thence northerly in the easterly line of said Battey Meeting House road, crossing said Saundersville Pike and continuing in the easterly line of said Battey Meeting House road one hundred eighty-nine (189) feet more or less; thence easterly in the southerly line of land now or formerly of said Willis J. Boss seven hundred eighteen (718) feet more or less; thence northerly in the easterly line of said Boss land one thousand three hundred eighteen (1,318) feet more or less; thence southerly in the westerly line of land now or formerly of James M. Edwards four hundred ninety-three (493) feet more or less; thence easterly in the southerly line of said Edwards land five hundred eighty-three (583) feet more or less; thence northerly in the easterly line of said Edwards land, land now or formerly of George W. Paine 3rd Heirs, land now or formerly of John W. Coggeshall, land now or formerly of Philip and Almira Shippee, crossing the aforementioned Danielson Pike, three thousand three hundred fourteen (3,314) feet more or less to a point in the northerly line of said Danielson Pike; thence westerly in the northerly line of said Danielson Pike one hundred nine (109) feet more or less to the point of
69 beginning:

and as said boundary line, as the "Boundary Line of the Main Taking," is shown in character on that certain accompanying plat, consisting of a title sheet and twenty-one additional sheets numbered progressively A-1 to A-21 both inclusive and said title sheet being marked as follows: "City of Providence Water Supply Board. Plat of Lands in the Towns of Scituate, Foster and Johnston Condemned by the City of Providence for Water Supply Purposes Under Chapter 1278 of the Public Laws of 1915. Prepared by the Water Supply Board, September 30, 1916. B. Thomas Potter, William A. Schofield, Henry A. Grimwood, William P. Vaughn, John Kelso, Joseph H. Gainer, Walter F. Slade, Water Supply Board of the City of Providence. Frank E. Winsor, Chief Engineer.

"This Plat consists of this title sheet and 21 sheets numbered A-1 to A-21 inclusive. An index sheet is attached hereto for convenient reference only.

"Plat consisting of a title sheet and 21 additional sheets, (numbered progressively A-1 to A-21 inclusive and all dated September 30, 1916), of Lands in the Towns of Scituate, Foster and Johnston, Condemned by the City of Providence for Water Supply Purposes, &c., under the provisions of Chapter 1278 of the Public Laws, entitled 'An Act to Furnish the City of Providence with a Supply of Pure Water,' passed by the General Assembly of the State of Rhode Island at its January Session, A. D. 1915, and by and in accordance with the resolution of the City Council of said City of Providence numbered 397, approved December fourth, 1916, and entitled 'Resolution of the City Council Taking Certain Lands and Waters for Water Supply Purposes.' Joseph H. Gainer, Mayor of the City of Providence,"

and said lands and parcels of land being the same as shown and delineated on said plat within said boundary line, express reference to said plat being hereby made for a more complete and several description of said lands and parcels of land; and including in this description and taking any and all real estate within said area, bounded by said line, acquired or used for railroad, highway, cemetery or other public or quasi public purpose or purposes, and whether acquired by, or held by title derived under, eminent domain or otherwise, except as hereinafter provided; but excluding and excepting from this description and this taking the street railroad easement or right of railroad location of the Providence and Danielson Railway Company, its successors and assigns, in said Danielson Pike and in the lands where that part of the present railroad is located which part extends from the junction of the new railroad location shown on said plat with the present railroad location northerly of said Rockland-Clayville road and westerly of said Ponaganset-Rockland road, generally westerly and then generally southwesterly to the point where it finally leaves said area at the Rockland-Clayville road at or near Pleasant lane as shown on said plat; and excluding and excepting from this description and this taking all lands and parcels of land included within the fence lines, as existing on the date of the passage of said Act, of the Glenford Cemetery situated in North Scituate south of said Main street, said lands and parcels of land being the same as a whole shown on said plat and marked thereon "Glenford Cemetery;" and this taking is made subject to that certain lease from the City of Providence to the North Scituate Cotton Mills of certain real estate within said area for the term of two years from October 28, 1916, which lease is dated October 28, 1916, and subject to that certain agreement between the City of Providence and the Ashland Company as to the use of certain real estate and property within said area for the period of one year from the date of the delivery of the deed specified therein which date of delivery was April 20, 1916, and which agreement is dated February 23, 1916.

And said City of Providence takes all said lands and parcels of land, which are hereinbefore set forth as included in the taking and are described in the next preceding paragraph hereof numbered "First," in fee simple, except as follows:

1. Said City of Providence does not take the public highway easement in any part of the following described roads or parts thereof: The Saundersville road from the Battey meeting house road westerly; the Ponaganset-Ashland road westerly of its junction shown on said plat with the causeway road crossing said stor-
71 age reservoir at or near Ashland, which causeway road is to be laid out and constructed pursuant to the requirement of Section 8 of said Act; the Chopmist Hill road and the Hopkins Mills road being two of the three roads from the Ponaganset-Ashland road to the Saundersville road and to the Danielson Pike specified in said Act; the road from Ponaganset running southerly of the Barden reservoir; the road from said Ponaganset-Ashland road through Rockland to Clayville and leading to Foster Centre; the road from Clayville over Fields hill to the new road connecting the northerly end of the Tunk hill road with said Fields hill road, said new road running from a point on said Plainfield pike at or easterly of the Tunk hill road northerly to a point on the Fields hill road near the Dark bridge road and to be laid out and constructed pursuant to the requirement of Section 8 of said Act; the Tunk hill road from the Plainfield pike to the new road leading to the Kent-Coventry road, said new road running from the junction of the Kent-Coventry road with another new road (designated in said Act as the new extension of the Bald hill road) at a point westerly of the junction of the Kent-Coventry road and the Tunk hill road in a northerly and northwesterly direction to said Tunk hill road and to be laid out and constructed pursuant to the requirement of Section 8 of said Act: the Kent-Coventry road from the new extension of the Bald hill road southwesterly, said new extension running from a point on the Bald hill-Kent road easterly or northeasterly of Kent westerly and along Burnt hill to a point on the Kent-Coventry road westerly of its junction with the Tunk hill road and to be laid out and constructed pursuant to the requirement of Section 8 of said Act; and all roads north of said Danielson Pike, except the short piece of road from the S. M. Olney heirs farm westerly to the school estate. But said City of Providence does take the underlying fee in all said roads and parts of roads described in this paragraph, which are, or to the extent that they are, included within said area, subject to the public highway easement therein, and takes said short piece of road from the S. M. Olney heirs farm westerly to the school estate in fee simple.

2. Said City of Providence does not take any public high-
72 way easement in any part of the state road through North Scituate known as the Danielson Pike; nor does it take the public highway easement in any part of the road known as the Hartford Pike. Nor does it take any public highway easement in any part of the state road known as the Plainfield Pike, except it does take the public highway easement in all that part thereof which will

be flowed by said storage reservoir or be obstructed by works pertaining thereto or constructed under the authority of said Act and which is described as follows: All that portion of the Plainfield Pike lying between the junction of said Plainfield Pike and the Tunk hill road, so-called, and the junction of said Plainfield Pike and the new road which is to be laid out and constructed pursuant to the requirements of Section 8 of said Act in lieu of a part of said Plainfield Pike, and connecting with said Plainfield pike near the Ashland road, so-called. Nor does it take any public highway easement in any portion of the Bald hill-Kent road, or any highway in extension thereof running westerly or southwesterly, except it does take the public highway easement in all those parts thereof which will be flowed by said storage reservoir, or be obstructed by the works pertaining thereto or constructed under the authority of said Act and which are described as follows: All that portion of the Bald hill-Kent road lying westerly of the point where the new extension of said Bald hill-Kent road, to be laid out and constructed pursuant to the requirements of Section 8 of said Act, leaves said Bald hill-Kent road; and all that portion of the Kent-Coventry road from the westerly end of said Bald hill-Kent road to the connection of said new extension of said Bald hill-Kent road with said Kent-Coventry road, which connection is westerly of the Tunk hill road; and all those portions of the Kent-Hope west road, and the Burnt hill road which lie within said boundary line. But said City of Providence does take the underlying fee in all said roads and parts of roads described in this paragraph which are, or to the extent that they are, included within said area and in which the public highway easement is not taken, subject to the public highway easement therein.

73 3. And said City of Providence takes all the lands within said area which are included in the roadway, as existing on the date of the passage of said Act, from said Main street in North Scituate to said Glenford cemetery, expressly subject to any and all public and private rights of way for travel on foot or by vehicles over the same to and from said cemetery.

4. Said City of Providence, in taking said lands and parcels of land hereinbefore set forth as included in the taking and described in paragraph numbered "First" herein, takes any such lands or parts thereof, in which there is a burial ground, cemetery, graves or places of human burial, and which are to be flowed by water or are located so near to said storage reservoir or any such waterway as to be liable to pollute or reduce the quality or value of any such waters as a potable water supply, subject to the requirement of said Act that said City shall remove the remains found in any such burial places and subject to the right of removal of the gravestones, monuments and markers of such graves as provided in Section 13 of said Act.

5. Said City of Providence, in taking said lands and parcels of land hereinbefore set forth as included in the taking and described

in the paragraph numbered "First" herein, takes any such lands or parts thereof, in which there is a burial ground, cemetery, graves or places of human burial, and which are not to be flowed by water or are not located so near to said reservoir or any such waterway as to be liable to pollute or reduce the quality or value of any such waters as a potable water supply, subject to the reservation in favor of the owner or owners of such burial ground, cemetery, graves or places of human burial, their heirs and assigns, and subject to any equitable right, that the remains and gravestones, monuments and markers of graves now therein or thereon may remain therein or thereon and shall not be disinterred or removed by said City, but there shall be no further burials made therein.

6. Said City of Providence, in taking said lands and parcels of land hereinbefore set forth as included in the taking and described in the paragraph numbered "First" herein, does not take any waters now or hereafter in, on or within the same, or any rights in or to any such waters, or any right to hold, appropriate or divert any such waters, for said water supply to any greater degree or extent than hereinafter provided in the express taking of waters, and the taking of said lands and parcels of land, in respect to any waters now or hereafter in, on or within the same, is hereby made subject to any and all the conditions, limitations, restrictions, reservations, obligations and requirements of said Act pertaining to the taking of the waters of said branch of the Pawtuxet river and its tributaries.

74

And said City of Providence takes all said lands, and estates, easements, rights and interests in lands, which are within said area and are hereinbefore described as taken, for the following specified purposes: for the location, construction, maintenance and operation of said storage reservoir (the main dam of said reservoir being located within said area near and south of the village of Kent in the Town of Scituate and as approximately shown on said plat, and the location of the flow line of said reservoir being within said area and as approximately shown in character on said plat), and any dams, sluices, culverts, water and land ways, and works connected therewith or incidental thereto, and for filtration and other works for treating said water supply, and for the location, construction, maintenance and operation of an aqueduct section from said storage reservoir to the easterly line of said area, and any of the same not required or used for said reservoir and works for protecting and preserving the waters in said river branch and its tributaries flowing thereto from pollution and from the deposit therein of any matters which would reduce the quality or value of any such waters as a potable water supply, and for the water supply purposes specified in said Act, and for locating therein and thereon the new public highways or the parts thereof within said area shown on said plat and required by said Act to be laid out and constructed by said City of Providence, and relative to the new public highway from the Danielson Pike to Rockland required by said Act to be laid out and constructed by said City, for furnishing in the part of the same

within said area the Providence and Danielson Railway Company, its successors and assigns, with the new location and street railway easement therein for a single track railroad with convenient turnouts specified in said Act, and for furnishing said Company,
75 its successors and assigns, with the new location and railroad easement specified in said Act in and across said Ponaganset-Rockland road and over land adjoining thereto and westerly thereof to the junction with the present track and location of said railroad as shown on said plat, and for said City's permitting said Providence and Danielson Railway Company, its successors and assigns to construct and maintain a high tension electric transmission line over or under any lands and waters within said area taken by said City as provided in said Act, and for said City's permitting any telegraph, telephone, electric light or electric power transmission company at any time existing under the laws of the State of Rhode Island or of the United States to construct and maintain its lines in, over or under any lands and waters within said area taken by said City as provided in said Act, and for carrying out the purposes, directions and requirements of said Act.

Second. All the lands and parcels of land, with any and all the improvements thereon, situated in said Town of Scituate and comprising or included within that certain strip of land shown on said plat, sheet A-10, and described as follows:

Beginning at a point in the southerly line of the Danielson Pike, so-called, said point being distant easterly six hundred seventy-eight (678) feet from a point in the southerly line of said pike in range with the westerly line of the Elmdale Cross Road, so-called, and four thousand one hundred thirty (4,130) feet more or less, measured along the southerly side of said pike, from Card's Corner at North Scituate; thence in a westerly direction with the arc of a curve to the left, radius six hundred ninety-one and eight-tenths (691.8) feet crossing land now or formerly of Henrietta and Cora M. Angell nine hundred ninety-eight and seven-tenths (998.7) feet; thence south thirty-five (35) degrees, thirteen (13) minutes west, with a line tangent to said curve crossing said Angell land three hundred and sixty-five and seven-tenths (365.7) feet; thence with the arc of a curve to the right, radius two thousand eight hundred eighty-nine and nine-tenths (2,889.9) feet crossing said Angell land three hundred twenty-four and five-tenths (324.5) feet; thence south forty-one (41) degrees, thirty-nine (39) minutes west, crossing said Angell land five hundred fifty-one and one-tenth (551.1) feet; thence with the arc of a curve to the right, radius one thousand one hundred seventy-one and three-tenths (1,171.3) feet, crossing said Angell land and land now or formerly of Henry A. Burlingame, one thousand thirty-six and one-tenth (1,036.1) feet; thence north eighty-seven (87) degrees, forty (40) minutes west, crossing
76 said Burlingame land eight hundred eighty-two and seven-tenths (882.7) feet; thence with the arc of a curve to the left, radius six hundred ninety-one and eight-tenths (691.8) feet,

49

crossing said Burlingame land, the Trimtown road, so-called, and land now or formerly of John Randall, nine hundred eighteen (918) feet; thence south sixteen (16) degrees, eighteen (18) minutes west, crossing said Randall land two hundred forty-seven (247) feet; thence with the arc of a curve to the right, radius seven hundred forty-one and eight-tenths (741.8) feet, crossing said Randall land and land now or formerly of Elizabeth A. Burnside two hundred sixty-five and eight-tenths (265.8) feet; thence south thirty-six (36) degrees, fifty (50) minutes west, crossing said Burnside land and land now or formerly of Henry T. Phillips, one thousand three hundred eleven and one-tenth (1,311.1) feet; thence with the arc of a curve to the right, radius one thousand one hundred seventy-one and three-tenths (1,171.3) feet, crossing land of said Henry T. Phillips four hundred thirty-one and seven-tenths (431.7) feet; thence south fifty-seven (57) degrees, fifty-seven (57) minutes west, crossing said Phillips land, the Saundersville Pike, so-called, and land now or formerly of Charles F. Hopkins, one thousand four hundred one and seven-tenths (1,401.7) feet; thence with the arc of a curve to the right, radius one thousand one hundred seventy-one and three-tenths (1,171.3) feet, crossing said Hopkins land and other land now or formerly of Henry T. Phillips, four hundred eighty and one-tenth (480.1) feet; thence south eighty-one (81) degrees, twenty-six (26) minutes west, crossing said Phillips land and land now or formerly of Martin Tierney, eight hundred fifty-six and one-tenth (856.1) feet; thence with the arc of a curve to the left, radius eleven hundred twenty-one and three-tenths (1,121.3) feet, crossing said Tierney land, two hundred twelve and five-tenths (212.5) feet; thence south seventy (70) degrees, thirty-four (34) minutes west, crossing said Tierney land, land now or formerly of Annie A. Phillips, the Westcott District road, so-called, and other land now or formerly of Annie A. Phillips, two thousand six hundred ninety-three (2,693) feet; thence with the arc of a curve to the left, radius one thousand one hundred twenty-one and three-tenths (1,121.3) feet, crossing said Phillips land three hundred twelve (312) feet; thence south fifty-four (54) degrees, thirty-eight (38) minutes west, crossing said Phillips land, land now or formerly of R. Ann Yeaw, land now or formerly of Emma M. Knowlton and land now or formerly of Benjamin and Phebe B. Wood, two thousand six hundred sixteen and three-tenths (2,616.3) feet; thence with the arc of a curve to the left, radius two thousand eight hundred thirty-nine and nine-tenths (2,839.9) feet, crossing said Benjamin and Phebe B. Wood land one thousand three hundred eleven and nine-tenths (1,311.9) feet; thence south twenty-eight (28) degrees, ten (10) minutes west, crossing said Benjamin and Phebe B. Wood land and land of the City of Providence, formerly of James R. Moore and wife, seven hundred eighty
77 (780) feet, to a point in the boundary line shown on said plat and described in the paragraph numbered "First" herein, and all the aforegoing courses and curves constituting as a whole the southerly or southeasterly line of said strip; thence westerly in said boundary line shown on said plat and described in said

paragraph "First" herein fifty-one and eight-tenths (51.8) feet to a point in the northerly or northwesterly side of said strip; thence in a general northeasterly direction in line parallel with said southerly or southeasterly side of said strip and fifty (50) feet therefrom, crossing lands of said City of Providence, formerly of James R. Moore and wife, lands now or formerly of said Benjamin and Phebe B. Wood, of said Emma M. Knowlton, of said R. Ann Yeaw and of said Annie A. Phillips, the Westcott District road, other land now or formerly of said Annie A. Phillips, lands now or formerly of said Martin Tierney, of said Henry T. Phillips and of said Charles F. Hopkins, the Saundersville Pike, other land now or formerly of said Henry T. Phillips, lands now or formerly of said Elizabeth A. Burnside and of said John Randall, the Trimtown road, and lands now or formerly of said Henry A. Burlingame, of Everett B. Dexter and of said Henrietta and Cora M. Angell to a point fifty (50) feet northerly of the westerly end of the curve first described herein in range with the radial line of said curve; thence easterly with the arc of a curve, fifty (50) feet northerly from and parallel with the arc of said curve first described herein crossing said Angell land three hundred ninety-six (396) feet more or less to a point in range with the westerly line of the aforementioned Elmdale Cross Road; thence northerly in range with said westerly line of said Elmdale Cross Road one hundred fifty-four (154) feet more or less to a point in the southerly line of said Danielson Pike; thence easterly with the southerly line of said Danielson Pike six hundred seventy-eight (678) feet to the point of beginning;

and said strip of land is shown and delineated on said plat, sheet numbered A-10, and said lands and parcels of land are the same as shown and delineated thereon within said strip, express reference to said plat being hereby made for a more complete and several description of said lands and parcels of land.

And said City of Providence takes all said lands and parcels of land which are within said strip and are described in the next preceding paragraph hereof numbered "Second" in fee simple for public highway uses and purposes and for furnishing the Providence and Danielson Railway Company, its successors and assigns, with the new location and street railway easement therein for a single track railroad with convenient turnouts, as specified in said Act, but subject to the public highway easement in all places where
78 said strip crosses or intersects any and all public highways or roads, or parts thereof, which are not permitted to be taken under said Act.

Third. All the lands and parcels of land, with any and all the improvements thereon, situated in said Town of Scituate and comprising or included within those two certain strips of land shown on said plat, sheet A-10, and described as follows: Said two strips of land immediately adjoin and bound on said single strip of land described in paragraph numbered "Second" herein, throughout the length of said single strip, one on the northwesterly side and the other on the southeasterly side thereof, and each holding the uni-

form width of twenty-five (25) feet extends from said Danielson Pike to said boundary line shown on said plat and described in paragraph numbered "First" herein, excepting that the said twenty-five (25) foot strip on the northwesterly side of said strip of land described in said paragraph numbered "Second" is bounded easterly by a line in range with the westerly line of the said Elmdale Cross Road; and also excepting that where said northwesterly strip of land would cross the land now or formerly of William M. Harris, situated between the said Saundersville Pike and said Westcott District road, said strip is less than twenty-five feet in width and is there bounded northerly and westerly by the southerly and easterly lines of said Harris land, and said Harris land is wholly excepted from this taking; and excepting that where said southeasterly strip of land would cross the land now or formerly of Isaac Burgess, situated west of the Westcott District road, said strip is less than twenty-five feet in width and is there bounded easterly and southerly by the westerly and northerly lines of said Burgess land, and said Burgess land is wholly excepted from this taking. Said two strips of land are shown and delineated on said sheet A-10 of said plat, and said lands and parcels of land are the same as shown and delineated thereon within said strips, express reference to said sheet A-10 of said plat being hereby made for a more complete and several description of said lands and parcels of land.

And said City of Providence takes in all said lands and parcels of land, which are within said two strips and are described in
79 the next preceding paragraph hereof numbered "Third," only an easement, to be held as appurtenant to said single strip of land described in said paragraph numbered "Second" and taken for public highway uses and purposes, for slopes and lateral support of the public highway required by said Act to be constructed by said City in and over said single strip of land, but subject to the public highway easement in all places where said two strips, or either thereof, cross or intersect any and all public highways or roads, or parts thereof, which are not permitted to be taken under said Act.

Fourth. All the lands and parcels of land, with any and all the improvements thereon, situated in said Town of Scituate and comprising or included within that certain strip of land shown on said plat, sheet A-21, and described as follows:

Beginning at a point in the southerly line of the Ponaganset-Ashland road, so-called, at the northwesterly corner of land now or formerly of John Ramsdell, said point being at an angle in the boundary line shown on said plat and described in paragraph numbered "First" herein; thence southerly in the boundary line between land of said John Ramsdell and land now or formerly of Auldis E. Barden eighteen (18) feet, said line being coincident with said boundary line; thence north eighty-four (84) degrees, twenty (20) minutes west, crossing said Auldis E. Barden land, two hundred fifteen (215) feet; thence westerly with the arc of a curve to the right, radius six hundred three and seven-tenths (603.7) feet, crossing said Barden land, two hundred twelve and nine-tenths

(212.9) feet; thence north sixty-four (64) degrees, eight (8) minutes west, crossing said Barden land, three hundred twenty-eight and one-tenth (328.1) feet; thence westerly with the arc of a curve to the right, radius six hundred three and seven-tenths (603.7) feet, crossing said Barden land, one hundred forty-six and seven-tenths (146.7) feet; thence north fifty (50) degrees, thirteen (13) minutes west, crossing said Barden land, three hundred fifty-four and four-tenths (354.4) feet; thence westerly with the arc of a curve to the left, radius five hundred forty-three and seven-tenths (543.7) feet, crossing said Barden land two hundred seventy-four and four-tenths (274.4) feet; thence north seventy-nine (79) degrees, eight (8) minutes west, crossing said Barden land, six hundred fifty-eight and one-tenth (658.1) feet to a point in the southerly line of said Ponaganset-Ashland road; thence westerly in the southerly line of said Ponaganset-Ashland road, two thousand thirteen (2,013) feet more or less to the intersection of the southerly line of said Ponaganset-Ashland road with the easterly line of the Wilbur Hollow road, so-called; thence westerly crossing said Wilbur Hollow road, eighty (80) feet more or less to a point at the intersection of
80 the southerly line of said Ponaganset-Ashland road with the westerly line of said Wilbur Hollow road; thence westerly in the southerly line of said Ponaganset-Ashland road, seven hundred (700) feet more or less; thence north sixty-one (61) degrees, twenty-seven (27) minutes west, crossing land now or formerly of James A. Hopkins, three hundred eighty-nine and seven-tenths (389.7) feet; thence westerly with the arc of a curve to the left, radius five hundred forty-three and seven-tenths (543.7) feet, crossing said Hopkins land, two hundred forty and two-tenths (240.2) feet; thence north eighty-six (86) degrees, forty-six (46) minutes west, crossing said Hopkins land and land now or formerly of James A. Barden, eight hundred eight and seven-tenths (808.7) feet; thence westerly with the arc of a curve to the right, radius six hundred three and seven-tenths (603.7) feet, crossing said James A. Barden land, one hundred sixty-seven and four-tenths (167.4) feet; thence north seventy (70) degrees fifty-three (53) minutes west, crossing said James A. Barden land, one hundred ninety-four and six-tenths (194.6) feet to a point in the southerly line of the aforementioned Ponaganset-Ashland road; thence westerly in the southerly line of said Ponaganset-Ashland road, eight hundred fifty-five (855) feet more or less to a point at the northeasterly corner of land now or formerly of William A. Brown, said point being at an angle in said boundary line described in paragraph numbered "First" herein; thence westerly in the southerly line of said Ponaganset-Ashland road, one thousand six hundred thirty-one (1,631) feet more or less, said last described line being coincident with said boundary line; thence northerly crossing said Ponaganset-Ashland road in a line coincident with said boundary line forty (40) feet more or less to a point in the northerly line of said Ponaganset-Ashland road; thence easterly in the northerly line of said Ponaganset-Ashland road, nine hundred ten (910) feet more or less; thence easterly with the arc of a curve to the right, radius six hundred three

and seven-tenths (603.7) feet, crossing land now or formerly of Oscar B. Blackmar, two hundred fifty-one and eight-tenths (251.8) feet; thence easterly with the arc of a curve to the left, radius five hundred forty-three and seven-tenths (543.7) feet crossing said Blackmar land and other land now or formerly of said James A. Barden, five hundred twenty-six and one-tenth (526.1) feet; thence south eighty-two (82) degrees, forty-six (46) minutes east, crossing said James A. Barden land, eight hundred nineteen and eight-tenths (819.8) feet to a point in the westerly line of the Westcott District road, so-called; thence southeasterly crossing said Westcott District road sixty-six (66) feet more or less to a point in the northerly line of said Ponaganset-A-hland road; thence easterly in the northerly line of said Ponaganset-Ashland road, four hundred fifty (450) feet more or less; thence south eighty-six (86) degrees, forty-six (46) minutes east, crossing other land now or formerly of said James A. Barden, four hundred ninety-five (495) feet to a point in the northerly line of said Ponaganset-Ashland road at the
81 southwesterly corner of land now or formerly of Howard W. Barden; thence easterly in the northerly line of said Ponaganset-Ashland road, five hundred eighty-five (585) feet more or less to the southeasterly corner of said Howard W. Barden land; thence south sixty-one (61) degrees, twenty-seven (27) minutes east, crossing land now or formerly of Hellen F. Pritz, sixty (60) feet; thence easterly with the arc of a curve to the right, radius six hundred three and seven-tenths (603.7) feet, crossing said Hellen F. Pritz land, two hundred twenty-four and four-tenths (224.4) feet; thence south forty (40) degrees, nine (9) minutes east, crossing said Hellen F. Pritz land, three hundred ten and nine-tenths (310.9) feet; thence easterly with the arc of a curve to the left, radius five hundred forty-three and seven-tenths (543.7) feet, crossing said Hellen F. Pritz land and land now or formerly of Edward F. Page, three hundred twenty-two and three-tenths (322.3) feet; thence south seventy-four (74) degrees, eight (8) minutes east, crossing said Edward F. Page land, three hundred twelve and one-tenth (312.1) feet; thence easterly with the arc of a curve to the left, radius five hundred forty-three and seven-tenths (543.7) feet, crossing other land now or formerly of said Auldis E. Barden, ninety-eight and seven-tenths (98.7) feet; thence south eighty-four (84) degrees, thirty-two (32) minutes east, crossing said Auldis E. Barden land, one thousand two hundred seventy-six (1,276) feet; thence easterly with the arc of a curve to the right, radius five thousand seven hundred fifty-nine and six-tenths (5,759.6) feet crossing said Auldis E. Barden land and land now or formerly of Henry B. Salisbury, four hundred forty-six and seven-tenths (446.7) feet to a point in the northerly line of said Ponaganset-Ashland road; thence easterly in the northerly line of said Ponaganset-Ashland road, nine hundred thirty (930) feet more or less to a point at the intersection of the northerly line of said Ponaganset-Ashland road with the westerly line of the Trimtown road, so-called; thence easterly crossing said Trimtown road, one hundred (100) feet to the said northerly line of said Ponaganset-Ashland road; thence easterly in the northerly line of said

Ponaganset-Ashland road, seven hundred ninety-one (791) feet more or less to the southeasterly corner of other land now or formerly of said Henry B. Salisbury; thence south eighty-four (84) degrees, twenty (20) minutes east, crossing land of the City of Providence, formerly of Eloi and Huldah Lacoste, one hundred sixty-nine (169) feet; thence easterly with the arc of a curve to the right, radius six hundred three and seven-tenths (603.7) feet, crossing said City of Providence land, one hundred sixty-two and six-tenths (162.6) feet to a point in said boundary line described in said paragraph numbered "First" herein; thence south two (2) degrees, fifty-one (51) minutes west, in a line coincident with said boundary line and crossing said Ponaganset-Ashland road ninety-four (94) feet more or less to a point in the southerly line of said Ponaganset-Ashland road; thence westerly in the southerly line of said Ponaganset-
82 Ashland road and coincident with said boundary line, one hundred eighty (180) feet more or less to the point of beginning;

and said strip of land is shown and delineated on said plat, sheet numbered A-21, and said lands and parcels of land are the same as shown and delineated thereon within said strip, express reference to said plat being hereby made for a more complete and several description of said lands and parcels of land.

And said City of Providence takes in all said lands and parcels of land which are within said strip and are described in the next preceding paragraph hereof numbered "Fourth" only an easement for public highway uses and purposes.

Fifth. All the lands and parcels of land, with any and all the improvements thereon, situated in said Town of Foster and comprising or included within that certain strip of land shown on said plat, sheets A-17 and A-19 and described as follows:

Beginning at the intersection of the southerly line of the Clayville-Foster Center road, so-called, with the easterly line of the Isthmus road, so-called; thence westerly and northwesterly along said southerly line two hundred forty-three (243) feet more or less; thence north eighty-three (83) degrees, thirty-six (36) minutes west, over part of the location of the Providence and Danielson Railway Company, one hundred eighty-six (186) feet; thence with the arc of a curve to the left, radius one thousand four hundred sixteen and seven-tenths (1,416.7) feet, over part of said Railway Company's location, three hundred forty-five and three-tenths (345.3) feet; thence with the arc of a curve to the right, radius two thousand one hundred sixty-four and eight-tenths (2,164.8) feet, over part of said Railway Company's location two hundred ninety-five (295) feet to the southerly or southeasterly line of said Clayville-Foster Center road; thence in a westerly direction along said southerly line of said road, four hundred thirty-one (431) feet; thence with the arc of a curve to the right, radius two thousand one hundred sixty-four and eight-tenths (2,164.8) feet, over part of said Railway Company's location, forty-three (43) feet; thence north seventy-seven (77) degrees, thirty-eight (38) minutes west, over part of said Railway Company's

location, two hundred sixty-one and seven-tenths (261.7) feet; thence with an angle of ninety (90) degrees to the left, over part of said Railway Company's location, fourteen (14) feet; thence with the arc of a curve to the left, radius seven hundred eighty-nine (789) feet, over part of said Railway Company's location and land now or formerly of Orrin W. Phillips Estate, four hundred forty-five
83 and nine-tenths (445.9) feet; thence southerly on a radial line to said arc crossing said Phillips land, ten (10) feet; thence southwesterly with the arc of a curve to the left, radius seven hundred seventy-nine (779) feet, crossing said Phillips land, three hundred thirty-four and two-tenths (334.2) feet; thence northwesterly on a radial line to said arc crossing said Phillips land, ten (10) feet; thence southwesterly with the arc of a curve to the left, radius seven hundred eighty-nine (789) feet, crossing said Phillips land, fifty-nine and six-tenths (59.6) feet; thence south forty-one (41) degrees, four (4) minutes west, crossing said Phillips land, five hundred seventeen and two-tenths (517.2) feet; thence with the arc of a curve to the right, radius six hundred three and seven-tenths (603.7) feet, crossing said Phillips land, one hundred thirty and two-tenths (130.2) feet to the southeasterly line of the Briggs road, so-called; thence southwesterly and westerly along the southeasterly and southerly line of said road, forty (40) feet; thence westerly with the arc of a curve to the right, radius six hundred three and seven-tenths (603.7) feet, crossing land now or formerly of William H. Williams, three hundred forty-four and six-tenths (344.6) feet; thence north eighty-nine (89) degrees, thirty-four (34) minutes west, crossing said Williams land and other land of said Orrin W. Phillips Estate, four hundred forty-six and two-tenths (446.2) feet; thence with the arc of a curve to the right, radius six hundred three and seven-tenths (603.7) feet, crossing said Phillips land, one hundred fifty-seven and four-tenths (157.4) feet; thence with the arc of a curve to the left, radius five hundred forty-three and seven-tenths (543.7) feet, crossing said Phillips land, three hundred fifty-nine and eight-tenths (359.8) feet; thence south sixty-seven (67) degrees, twenty-four (24) minutes west, crossing said Phillips land and land now or formerly of Pardon P. Pray and wife, one thousand seven hundred fifty-six and eight-tenths (1,756.8) feet to land now or formerly of Nathan M. Wright; thence with the arc of a curve to the left, radius two thousand eight hundred thirty-four and nine-tenths (2,834.9) feet crossing said land of Nathan M. Wright, one hundred sixty-three (163) feet to the southerly line of said Briggs road; thence westerly along said southerly line of said Briggs road, two hundred eight (208) feet; thence south fifty-nine (59) degrees, fifty-three (53) minutes west, crossing land of said Nathan M. Wright, five hundred ninety-one and two-tenths (591.2) feet; thence with the arc of a curve to the left, radius five hundred forty-three and seven-tenths (543.7) feet, crossing said Wright land, three hundred seventy-six and six-tenths (376.6) feet to the easterly line of said Briggs road; thence southerly along the easterly line of said Briggs road, two thousand seventy-five (2,075) feet to land now or formerly of Byron M. Lewis; thence with the arc of a curve to the right, radius six hundred three and seven-tenths (603.7) feet, cross-

ing said land of Byron M. Lewis one hundred forty-three (143) feet; thence south forty-one (41) degrees, thirty-three (33)
84 minutes west, crossing said Lewis land and land now or formerly of James L. Phillips, one thousand twenty and four-tenths (1,020.4) feet; thence with the arc of a curve to the left, radius five hundred forty-three and seven-tenths (543.7) feet crossing said Phillips land, land now or formerly of Walter Dunham and said Phillips land, three hundred sixty-two and three-tenths (362.3) feet; thence south three (3) degrees, twenty-two (22) minutes west, crossing said Phillips land seven hundred forty-two and four-tenths (742.4) feet; thence with the arc of a curve to the left, radius nine hundred twenty-five and four-tenths (925.4) feet, crossing said Phillips land, three hundred sixteen and six-tenths (316.6) feet; thence south sixteen (16) degrees, fifteen (15) minutes east, crossing said Phillips land, two hundred forty-five (245) feet; thence with the arc of a curve to the right, radius nine hundred eighty-five and four-tenths (985.4) feet, crossing said Phillips land, two hundred fifty-three and nine-tenths (253.9) feet; thence south one (1) degree, thirty (30) minutes east, crossing said Phillips land, land now or formerly of Warren W. Bennett, the Howard Hill road, so-called, and other land now or formerly of Warren W. Bennett, two thousand eight hundred sixty-one and one-tenth (2,861.1) feet; thence with the arc of a curve to the left, radius nine hundred twenty-five and four-tenths (925.4) feet crossing said Warren W. Bennett land, one hundred eighty-seven and two-tenths (187.2) feet; thence south thirteen (13) degrees, six (6) minutes east, crossing said Bennett land two hundred fifty-seven and six-tenths (257.6) feet; thence with the arc of a curve to the right, radius six hundred three and seven-tenths (603.7) feet, crossing said Warren W. Bennett land one hundred seventy-eight and one-tenth (178.1) feet; thence south three (3) degrees, forty-eight (48) minutes west, crossing said Bennett land seven hundred seventy-five and eight-tenths (775.8) feet; thence with the arc of a curve to the left, radius one hundred sixty-three and two-tenths (163.2) feet, crossing said Bennett land three hundred fifteen and nine-tenths (315.9) feet; thence north seventy-two (72) degrees, fifty-two (52) minutes east, crossing said Bennett land, thirty-five (35) feet more or less to the northerly line of the Plainfield Pike; thence westerly with said northerly line of said Plainfield Pike, five hundred eighty (580) feet, more or less; thence north forty (40) degrees, fifty-three (53) minutes east, crossing land now or formerly of James E. Cahoone and wife, one hundred ten (110) feet, more or less; thence with the arc of a curve to the left, radius five hundred forty-three and seven-tenths (543.7) feet, crossing said Cahoone land and said Warren W. Bennett land, three hundred fifty-one and nine-tenths (351.9) feet; thence north three (3) degrees, forty-eight (48) minutes east, crossing said Warren W. Bennett land, eight hundred eleven (811) feet; thence on a line sixty (60) feet westerly from and parallel to the curves and tangents hereinbefore described, crossing said Bennett land, the Howard Hill road, said Bennett land, land now or formerly of Henry K.
85 Luther, said James L. Phillips land and said Walter Dunham

land to the southeasterly line of the hereinbefore mentioned Briggs road at a point on said southeasterly line of said road distant westerly along said line one hundred one (101) feet more or less from the northeasterly corner of said Walter Dunham land; thence crossing said Briggs road at right angles with said southeasterly line about thirty-three (33) feet to the northwesterly line of said road; thence northeasterly along said northwesterly line of said Briggs road, one thousand one hundred seventy-five (1,175) feet more or less; thence with the arc of a curve to the left, radius five hundred forty-three and seven-tenths (543.7) feet, crossing land now or formerly of David S. Morrell and wife, two hundred two and five-tenths (202.5) feet; thence north twenty (20) degrees, twelve (12) minutes east, crossing said Morrell land, other land now or formerly of Nathan M. Wright and land now or formerly of Brayton A. Round, two thousand thirty-three and six-tenths (2,033.6) feet; thence with the arc of a curve to the right, radius six hundred three and seven-tenths (603.7) feet, crossing said Brayton A. Round land one hundred ninety-five (195) feet to a point on the northerly line of said Briggs road; thence easterly along said northerly line of said road, seventy-six (76) feet; thence with the arc of a curve to the right, radius six hundred three and seven-tenths (603.7) feet, crossing land now or formerly of Alfreda E. Hill and others, one hundred fifty-one and one-tenth (151.1) feet; thence north fifty-nine (59) degrees, fifty-three (53) minutes east, crossing said Hill land, five hundred ninety-one and two-tenths (591.2) feet; thence with the arc of a curve to the right, radius two thousand eight hundred ninety-four and nine-tenths (2,894.9) feet, crossing said Hill land and land now or formerly of Job Randall three hundred seventy-nine and eight-tenths (379.8) feet; thence north seventy (70) degrees, nine (9) minutes east, crossing said Randall land and other land now or formerly of Alfreda E. Hill Estate, one thousand seven hundred forty-four (1,744) feet more or less to a point on the northerly line of said Briggs road; thence easterly along said northerly line of said road two hundred ninety-eight (298) feet, more or less; thence with the arc of a curve to the right, radius six hundred three and seven-tenths (603.7) feet, crossing land now or formerly of Pardon P. Pray and wife one hundred ten (110) feet, more or less; thence with the arc of a curve to the left, radius five hundred forty-three and seven-tenths (543.7) feet, crossing said Pray land, one hundred forty-one and four-tenths (141.4) feet; thence south eighty-nine (89) degrees, thirty-four (34) minutes east, crossing said Pray land three hundred seventy (370) feet to the northerly line of said Briggs road; thence easterly with the said northerly line of said road three hundred thirty-two (332) feet more or less; thence northwesterly with the arc of a curve to the left, radius five hundred forty-three and seven-tenths (543.7) feet, crossing said Pray land two hundred eight (208) feet more or less; thence north forty-one (41) degrees, four (4) minutes east, crossing said Pray land and said
86 Briggs road five hundred seventeen and two-tenths (517.2) feet to a point in said Briggs road; thence with the arc of a curve to the right, radius eight hundred forty-nine (849) feet, crossing said Briggs road and land now or formerly of said Orrin W.

Phillips Estate hereinbefore mentioned, one hundred sixty-six and nine-tenths (166.9) feet; thence northwesterly on a radial line to said arc crossing said Phillips land ten (10) feet; thence northeasterly with the arc of a curve to the right, radius eight hundred fifty-nine (859) feet, crossing said Phillips land two hundred sixty-one and six-tenths (261.6) feet; thence southeasterly on a radial line to said arc, crossing said Phillips land ten (10) feet; thence northeasterly with the arc of a curve to the right, radius eight hundred forty-nine (849) feet, crossing said Phillips land one hundred ninety-four and four tenths (194.4) feet to the southerly line of said Clayville-Foster Center road; thence crossing said Clayville-Foster Center road at right angles with said southerly line of said road forty (40) feet more or less to the northerly line of said road; thence easterly along said northerly line of said road six hundred (600) feet more or less; thence with the arc of a curve to the left, radius two thousand one hundred eighteen and eight-tenths (2,118.8) feet, crossing land now or formerly of John W. Bowen, the said Clayville-Foster Center road, land of said Providence and Danielson Railway Company, and land now or formerly of Fred S. Bowen, six hundred ninety-eight and one-tenth (698.1) feet; thence with the arc of a curve to the right, radius one thousand four hundred sixty-two and seven-tenths (1,462.7) feet, crossing said Fred S. Bowen land, three hundred fifty-six and six-tenths (356.6) feet; thence south eighty-three (83) degrees, thirty-six (36) minutes east, crossing said Bowen land, the said Clayville-Foster Center road and land now or formerly of Cephronia D. Cole, four hundred and five-tenths (400.5) feet; thence south fifty (50) minutes east, crossing said Cole land, seventeen (17) feet more or less to the northerly line of said Clayville-Foster Center road; thence southerly crossing said road fifty-five (55) feet more or less to the point of beginning;

and said strip of land is shown and delineated on said plat, sheets numbered A-17 and A-19, and said lands and parcels of land are the same as shown and delineated thereon within said strip, express reference to said plat being hereby made for a more complete and several description of said lands and parcels of land.

And said City of Providence takes in all said lands and parcels of land which are within said strip and are described in the next preceding paragraph hereof numbered "Fifth" only an easement for public highway uses and purposes.

Sixth. All the lands and parcels of land, with any and all the improvements thereon, situated in said Town of Scituate and
87 comprising or included within that certain strip of land shown on said plat, sheet A-13, as a new highway and described as follows:

Beginning at a point in the southerly line of the Tunk Hill road, so-called, about fifteen hundred (1,500) feet westerly from the westerly line of land of the City of Providence, formerly of Benjamin F. Whitman; thence southeasterly with the arc of a curve to the right, radius five hundred ninety-eight and seven-tenths (598.7) feet, crossing land now or formerly of Sylvania Whitman and said Ben-

jamin F. Whitman, three hundred forty-three (343) feet more or less; thence south nine (9) degrees, forty-eight (48) minutes east, crossing said Whitman land one hundred eighty-five and six-tenths (185.6) feet; thence southerly with the arc of a curve to the right, radius seven hundred forty-one and eight-tenths (741.8) feet, crossing said Whitman land four hundred forty-two and eight-tenths (442.8) feet; thence south twenty-four (24) degrees, twenty-four (24) minutes west, crossing said Whitman land and land of the City of Providence, formerly of Lyman A. Knight, five hundred seventy-five and two-tenths (575.2) feet; thence southerly with the arc of a curve to the left, radius one thousand one hundred twenty-one and three-tenths (1,121.3) feet, crossing said City of Providence land four hundred seventy-five and six-tenths (475.6) feet; thence south no (0) degrees, six (6) minutes west, crossing said City of Providence land, three hundred sixty-one and two-tenths (361.2) feet; thence southeasterly with the arc of a curve to the left, radius five hundred forty-eight and seven-tenths (548.7) feet, crossing said City of Providence land seven hundred forty-two (742) feet more or less to the northerly line of the Kent-Coventry road at or near the boundary line shown on said plat and described in the paragraph numbered "First" herein; thence westerly with the northerly line of said Kent-Coventry road, four hundred fifty (450) feet more or less; thence northeasterly with the arc of a curve to the left, radius one hundred sixty-eight and two-tenths (168.2) feet, crossing said City of Providence land, three hundred twenty-one and five-tenths (321.5) feet; thence northerly with the arc of a curve to the right, radius five hundred ninety-eight and seven-tenths (598.7) feet, crossing said City of Providence land, three hundred ninety-four (394) feet; thence north no (0) degrees, six (6) minutes east, crossing said City of Providence land, three hundred sixty-one and two-tenths (361.2) feet; thence northerly with the arc of a curve to the right, radius one thousand one hundred seventy-one and three-tenths (1,171.3) feet crossing said City of Providence land, four hundred ninety-six and eight-tenths (496.8) feet; thence north twenty-four (24) degrees, twenty-four (24) minutes east, crossing said City of Providence land and said land of the aforementioned Sylvania and Benjamin F. Whitman, five hundred seventy-five and two-tenths (575.2) feet; thence northerly with the arc of a curve to the left, radius six hundred ninety-one and eight-tenths (691.8) feet
88 crossing said Whitman land four hundred twelve and nine-tenths (412.9) feet; thence north nine (9) degrees, forty-eight (48) minutes west, crossing said Whitman land, one hundred eighty-five and six-tenths (185.6) feet; thence northwesterly with the arc of a curve to the left, radius five hundred forty-eight and seven-tenths (548.7) feet, crossing said Whitman land, five hundred forty-seven (547) feet more or less to the southerly line of the aforementioned Tunk Hill road; thence easterly with the southerly line of said Tunk Hill road two hundred fifty (250) feet more or less to the place of beginning;

and said strip of land is shown and delineated on said plat, sheet numbered A-13, and said lands and parcels of land are the same as

shown and delineated thereon within said strip, express reference to said plat being hereby made for a more complete and several description of said lands and parcels of land.

And said City of Providence takes in all said lands and parcels of land which are within said strip and are described in the next preceding paragraph hereof numbered "Sixth" only an easement for public highway uses and purposes.

Seventh. All the lands and parcels of land, with any and all the improvements thereon, situated in said Town of Scituate and comprising or included within that certain strip of land shown on said plat, sheet A-9, as a new highway and described as follows:

Beginning at a point in the easterly line of the Kent-Hope East Road, so-called, thirteen hundred (1,300) feet more or less southerly from the northwesterly corner of land now or formerly of Nathan and Ebenezer B. Fiske; thence northerly with the arc of a curve to the right, radius one thousand one hundred seventy-one and three-tenths (1,171.3) feet, crossing said Fiske land, forty-two (42) feet more or less; thence north five (5) degrees, fifty-nine (59) minutes east, crossing said Fiske land one thousand one hundred thirty-five and six-tenths (1,135.6) feet; thence northerly with the arc of a curve to the left, radius five hundred forty-eight and seven-tenths (548.7) feet, crossing said Fiske land two hundred sixty-seven and four-tenths (267.4) feet; thence north twenty-one (21) degrees, fifty-six (56) minutes west, crossing said Fiske land, sixty-five (65) feet more or less to the boundary line shown on said plat and described in paragraph numbered "First" herein; thence easterly in a line coincident with said boundary line fifty-three (53) feet more or less; thence south twenty-one (21) degrees, fifty-six (56) minutes east, crossing said Fiske land, forty-eight (48) feet more or less; thence southerly with the arc of a curve to the right, radius five hundred ninety-eight and seven-tenths (598.7) feet, crossing
89 said Fiske land two hundred ninety-one and eight-tenths (291.8) feet; thence south five (5) degrees, fifty-nine (59) minutes west, crossing said Fiske land one thousand one hundred thirty-five and six-tenths (1,135.6) feet; thence southerly with the arc of a curve to the left, radius one thousand one hundred twenty-one and three-tenths (1,121.3) feet, crossing said Fiske land three hundred ninety (390) feet more or less to a point in the easterly line of said Kent-Hope East Road; thence northerly in the easterly line of said road, three hundred sixty-five (365) feet more or less to the place of beginning;

and said strip of land is shown and delineated on said plat, sheet numbered A-9, and said lands and parcels of land are the same as shown and delineated thereon within said strip, express reference to said plat being hereby made for a more complete and several description of said lands and parcels of land.

And said City of Providence takes in all said lands and parcels of land which are within said strip and are described in the next preceding paragraph hereof numbered "Seventh" only an easement for public highway uses and purposes.

Eighth. All the lands and parcels of land, with any and all the improvements thereon, situated in said Town of Scituate and comprising or included within that certain strip of land shown on said plat, sheet A-21, and described as follows:

Beginning at a point in the boundary line shown on said plat and described in paragraph numbered "First" herein, said point being about one hundred twenty (120) feet northerly from the northerly line of the Burnt Hill road, so-called; thence southwesterly with the arc of a curve to the left, radius three hundred eighty-five and three-tenths (385.3) feet crossing land of the City of Providence, formerly of Arthur S. Field and land now or formerly of Asa E. Colvin, two hundred ninety-two (292) feet; thence south fifteen (15) degrees, nineteen (19) minutes west, crossing said Colvin land, one hundred sixty-seven and nine-tenths (167.9) feet; thence southwesterly with the arc of a curve to the right, radius five hundred ninety-eight and seven-tenths (598.7) feet, crossing said Colvin land, said Burnt Hill road, and other land now or formerly of said Asa E. Colvin, two hundred seventy-eight and eight-tenths (278.8) feet; thence south forty-one (41) degrees, fifty-four (54) minutes west, crossing said Colvin land, one hundred sixty and nine-tenths (160.9) feet; thence southwesterly with the arc of a curve to the left, radius five hundred forty-eight and seven-tenths (548.7) feet, crossing said Colvin land, one hundred thirty-six and six-tenths (136.6) feet; thence south twenty-seven (27) degrees, thirty-eight (38) minutes west, 90 crossing said Colvin land, two hundred ninety-seven and five-tenths (297.5) feet; thence southwesterly with the arc of a curve to the right, radius five hundred ninety-eight and seven-tenths (598.7) feet, crossing said Colvin land, one hundred eighty-seven and nine-tenths (187.9) feet to a point in the southerly line of said Burnt Hill road; thence westerly in the southerly line of said Burnt Hill road one thousasd two hundred sixty-seven (1,267) feet more or less, to a point in the easterly line of land now or formerly of Clinton H. Johnson; thence northerly crossing said Burnt Hill road and continuing in the easterly line of said Johnson land one hundred twenty-seven (127) feet more or less; thence northwesterly with the arc of a curve to the right, radius four hundred thirty-five and three-tenths (435.3) feet, crossing said Johnson land, one hundred twenty-one (121) feet; thence north fifty-two (52) degrees, twenty-seven (27) minutes west, crossing said Johnson land, seven hundred ninety-five and five-tenths (795.5) feet; thence northwesterly with the arc of a curve to the left, radius six hundred ninety-one and eight-tenths (691.8) feet, crossing said Johnson land two hundred eighty-three and five-tenths (283.5) feet to a point in the southerly line of land now or formerly of Emery Walker and wife: thence north seventy-five (75) degrees, fifty-six (56) minutes west, crossing said Walker land, two hundred sixty-two and nine-tenths (262.9) feet; thence northwesterly with the arc of a curve to the right, radius five hundred ninety-eight and seven-tenths (598.7) feet, crossing said Walker land, three hundred twenty-eight and one-tenth (328.1) feet; thence north forty-four (44) degrees, thirty-two (32) minutes west; crossing said Walker land, and land of the City of Providence,

formerly of Lyman A. Knight, fifty-nine and three-tenths (59.3) feet; thence northwesterly with the arc of a curve to the right, radius one thousand one hundred seventy-one and three-tenths (1,171.3) feet, crossing said City of Providence land, fifty (50) feet to said boundary line shown on said plat and described in paragraph numbered "First" herein; thence north seventy-two (72) degrees, fifty-one (51) minutes east, in a line coincident with said boundary line thirty (30) feet, to an angle in said boundary line; thence northerly in a line coincident with said boundary line forty-five (45) feet; thence southeasterly with the arc of a curve to the left, radius one thousand one hundred twenty-one and three-tenths (1,121.3) feet, crossing said Walker land seventy-seven (77) feet; thence south forty-four (44) degrees, thirty-two (32) minutes east, crossing said Walker land fifty-nine and three-tenths (59.3) feet; thence southeasterly with the arc of a curve to the left, radius five hundred forty-eight and seven-tenths (548.7) feet, crossing said Walker land three hundred and seven-tenths (300.7) feet; thence south seventy-five (75) degrees, fifty-six (56) minutes east, crossing said Walker land, two hundred sixty-two and nine-tenths (262.9) feet; thence southeasterly with the arc of a curve to the right, radius seven hundred forty-one and eight-tenths (741.8) feet, crossing said Walker land and said Johnson land three hundred four (304) feet; thence
91 south fifty-two (52) degrees, twenty-seven (27) minutes east, crossing said Johnson land seven hundred ninety-five and five-tenths (795.5) feet; thence southeasterly with the arc of a curve to the left, radius three hundred eighty-five and three-tenths (385.3) feet, crossing said Johnson land and land now or formerly of said Emery Walker and wife, four hundred thirty-five and five-tenths (435.5) feet; thence north sixty-two (62) degrees, forty-six (46) minutes east, crossing said Walker land, three hundred twenty-one (321) feet to a point in the northerly line of said Burnt Hill road; thence easterly in the northerly line of said Burnt Hill road eighty (80) feet more or less; thence north sixty-two (62) degrees, forty-six (46) minutes east, crossing said Walker land and land now or formerly of George P. Howard, three hundred five (305) feet; thence easterly with the arc of a curve to the left, radius five hundred forty-eight and seven-tenths (548.7) feet, crossing said Howard land and other land now or formerly of said Asa E. Colvin, two hundred fifty-four (254) feet to a point in the northwesterly line of said Burnt Hill road; thence northeasterly in the northwesterly line of said Burnt Hill road one hundred four (104) feet, more or less; thence north twenty-seven (27) degrees, thirty-eight (38) minutes east, crossing said Colvin land two hundred seventy-five (275) feet; thence northeasterly with the arc of a curve to the right, radius five hundred ninety-eight and seven-tenths (598.7) feet, crossing said Colvin land, one hundred forty-nine and one-tenth (149.1) feet; thence north forty-one (41) degrees, fifty-four (54) minutes east, crossing said Colvin land, one hundred sixty and nine-tenths (160.9) feet; thence northeasterly with the arc of a curve to the left, radius five hundred forty-eight and seven-tenths (548.7) feet, crossing said Colvin land two hundred fifty-four and seven-tenths (254.7) feet; thence north

fifteen (15) degrees, nineteen (19) minutes east, crossing said Colvin land, one hundred sixty-seven and nine-tenths (167.9) feet; thence northeasterly with the arc of a curve to the right, radius four hundred thirty-five and three-tenths (435.3) feet, crossing said Colvin land and land of the City of Providence, formerly of Arthur S. Field, three hundred forty-seven (347) feet, to said boundary line; thence southerly in a line coincident with said boundary line fifty-two (52) feet more or less to the point of beginning;

and said strip of land is shown and delineated on said plat, sheet numbered A-21, and said lands and parcels of land are the same as shown and delineated thereon within said strip, express reference to said plat being hereby made for a more complete and several description of said lands and parcels of land.

And said City of Providence takes in all said lands and parcels of land which are within said strip and are described in the next
92 preceding paragraph hereof numbered "Eighth" only an easement for public highway uses and purposes.

Ninth. All the lands and parcels of land, with any and all the improvements thereon, situated in said Town of Scituate and comprising or included within that certain strip of land shown on said plat, sheet A-21, and described as follows:

Beginning at a point in the westerly line of the Kent-Hope West Road, so-called, said point being about one thousand five hundred (1,500) feet southerly from the southeasterly corner of land now or formerly of George P. Howard; thence northerly crossing land now or formerly of Frank W. Howard, twenty-five (25) feet to a point five (5) feet westerly from the westerly line of said Kent-Hope West Road; thence northwesterly with the arc of a curve to the left, radius three hundred thirty-four and three-tenths (334.3) feet, crossing said Frank W. Howard land, five hundred sixty-three (563) feet; thence north seventy-nine (79) degrees, fifty-three (53) minutes west, crossing said Frank W. Howard land five hundred eighty-six and four-tenths (586.4) feet; thence westerly with the arc of a curve to the right, radius one thousand one hundred seventy-one and three-tenths (1,171.3) feet, crossing said Frank W. Howard land ninety and three tenths (90.3) feet; thence north seventy-five (75) degrees, twenty-eight (28) minutes west, crossing said Frank W. Howard land, one hundred eighty-five (185) feet to a point in the easterly line of land now or formerly of said George P. Howard; thence southerly in the easterly line of said George P. Howard land five and two-tenths (5.2) feet; thence north seventy-five (75) degrees, twenty-eight (28) minutes west, crossing said George P. Howard land, three hundred five and nine-tenths (305.9) feet; thence northwesterly with the arc of a curve to the right, radius six hundred three and seven-tenths (603.7) feet, crossing said George P. Howard land, five hundred nine and three-tenths (509.3) feet; thence north twenty-seven (27) degrees, eight (8) minutes west, crossing said George P. Howard land one hundred ninety-four and seven-tenths (194.7) feet; thence northwesterly with the arc of a curve to the left, radius five hundred forty-three and seven-tenths (543.7) feet, crossing said George P. Howard

land, one hundred forty-two and three-tenths (142.3) feet; thence northerly in a radial line to the last described arc crossing said George P. Howard land five (5) feet; thence northwesterly with the arc of a curve to the left, radius five hundred forty-eight and seven-tenths (548.7) feet, crossing said George P. Howard land, three hundred ninety-five (395) feet; thence north eighty-three (83) degrees, twenty-three (23) minutes west, crossing said George P. Howard land four hundred fifteen and five-tenths (415.5) feet; thence westerly with the arc of a curve to the right, radius one thousand one hundred seventy-one and three-tenths (1,171.3) feet, crossing said George P. Howard land two hundred twenty-five and two-
93 tenths (225.2) feet; thence north seventy-two (72) degrees, twenty-two (22) minutes west, crossing said George P. Howard land, eight hundred fifteen (815) feet more or less to a point in the southerly line of the Burnt Hill road, so-called, said point being one hundred seventy-six (176) feet more or less easterly from a point in the southerly line of said Burnt Hill road, said last mentioned point being in range with the easterly line of land now or formerly of Clinton H. Johnson; thence easterly in the southerly line of said Burnt Hill road one hundred ninety-one (191) feet; thence southerly one hundred (100) feet more or less to a point fifty (50) feet northerly of the southwesterly line of said strip measured at right angles to said southwesterly line; thence south seventy-two (72) degrees, twenty-two (22) minutes east, crossing said George P. Howard land five hundred ninety-five (595) feet; thence with the arc of a curve to the left, radius one thousand one hundred twenty-one and three-tenths (1,121.3) feet crossing said Howard land, two hundred fifteen and six-tenths (215.6) feet; thence south eighty-three (83) degrees, twenty-three (23) minutes east, crossing said Howard land, four hundred fifteen and five-tenths (415.5) feet; thence with the arc of a curve to the right, radius five hundred ninety-eight and seven-tenths (598.7) feet crossing said Howard land four hundred thirty-one (431) feet; thence easterly in a radial line to said last mentioned arc, crossing said Howard land five (5) feet; thence with the arc of a curve to the right, radius six hundred three and seven-tenths (603.7) feet crossing said Howard land one hundred fifty-eight (158) feet; thence south twenty-seven (27) degrees, eight (8) minutes, crossing said Howard land, one hundred ninety-four and seven-tenths (194.7) feet; thence with the arc of a curve to the left, radius five hundred forty three and seven-tenths (543.7) feet, crossing said Howard land four hundred fifty-eight and six-tenths (458.6) feet; thence south seventy-five (75) degrees, twenty-eight (28) minuates east, crossing said Howard land, two hundred eighty-nine and one-tenth (289.1) feet to land now or formerly of said Frank W. Howard; thence southerly in the easterly line of said Frank W. Howard land five and two-tenths (5.2) feet; thence south seventy-five (75) degrees, twenty-eight (28) minutes east, crossing said Frank W. Howard land, one hundred ninety-nine (199) feet; thence with the arc of a curve to the left, radius eleven hundred twenty-one and three-tenths (1,121.3) feet, crossing said

Frank W. Howard land, eighty-six and four-tenths (86.4) feet; thence south seventy-nine (79) degrees, fifty-three (53) minutes east, crossing said Frank W. Howard land, five hundred eighty-six and four-tenths (586.4) feet; thence with the arc of a curve to the right, radius three hundred eighty-four and three-tenths (384.3) feet, crossing said Frank W. Howard land, four hundred fifty-five (455) feet more or less to a point in the westerly line of said Kent-Hope West Road; thence southerly in the westerly line of said Kent-Hope West Road, two hundred seven (207) feet more or less to the place of beginning;

94 and said strip of land is shown and delineated on said plat, sheet numbered A-21, and said lands and parcels of land are the same as shown and delineated thereon within said strip, express reference to said plat being hereby made for a more complete and several description of said lands and parcels of land.

And said City of Providence takes in all said lands and parcels of land which are within said strip and are described in the next preceding paragraph hereof numbered "Ninth" only an easement for public highway uses and purposes.

Tenth. All the lands, with any and all the improvements thereon, situated in said Town of Scituate and comprising or included within that certain tract of land shown on said plat, sheet A-17, as parcel numbered 650-D and marked "General Burial Ground" thereon, and bounded and described as follows:

Beginning at a point on land of Mercie A. Wells at a corner in the boundary line shown on said plat and described in paragraph numbered "First" herein; thence south forty-five (45) degrees forty-one (41) minutes east, along said boundary line three hundred fifty-seven and nine-tenths (357.9) feet; thence south thirty-two (32) degrees, two (2) minutes east, along said boundary line two hundred thirty and three-tenths (230.3) feet; thence south four (4) degrees, thirty-two (32) minutes east, along said boundary line three hundred twenty-one (321) feet more or less to the northwesterly line of the location of the Providence and Danielson Railway Company; thence southwesterly in the northwesterly line of said location which line is coincident with said boundary line, three hundred and three-tenths (300.3) feet; thence north eighty-two (82) degrees, fifty-two (52) minutes west, along said boundary line one hundred seventy-one and two-tenths (171.2) feet; thence north sixty-three (63) degrees, forty-nine (49) minutes west, along said boundary line three hundred twenty-eight and seven-tenths (328.7) feet; thence north no (0) degrees, forty-three (43) minutes east, along said boundary and a line in continuation of said boundary line crossing said Wells land seven hundred ninety-five (795) feet; thence south eighty-seven (87) degrees, fifty-eight (58) minutes east, crossing said Wells land, two hundred eighty-two and two-tenths (282.2) feet to the point of beginning;

and said tract of land is shown and delineated on said plat, sheet numbered A-17, and said lands are the same as shown and delineated

thereon within said tract, express reference to said plat being hereby made for a more complete description of said lands. But there is excepted, however, from this description and this taking the
95 the existing burial ground within said tract which burial ground is shown on said plat sheet as parcel numbered 1184 containing six-hundredths (6-100) of an acre, and which burial ground is entirely surrounded by a stone wall.

And said City of Providence takes all said lands and parcels of land, except said burial ground, which are within said tract and are described in the next preceding paragraph hereof numbered "Tenth" in fee simple and for a general burial ground for reburying therein the remains found in any burial ground, cemetery, graves or places of human burial, within any lands now or hereafter acquired by said City by purchase or condemnation under the provisions of said Act, which places are to be flowed by water or are located so near to said storage reservoir or any such waterway as to be liable to pollute or reduce the quality or value of any such waters as a potable water supply, and which remains are not elsewhere reinterred in conformity with the provisions of said Act, and for the uses and purposes specified in Section 13 of said Act.

Eleventh. All the lands and parcels of land, with any and all the improvements thereon, situated in said Town of Scituate and comprising or included within that certain tract of land shown on said plat, sheet A-9, as parcels numbered 7-D and 8-D and marked "General Burial Ground" thereon, and bounded and described as follows:

Beginning at a point in the westerly line of the Kent-Hope East Road, so-called, at a corner in the boundary line shown on said plat and described in paragraph numbered "First" herein; thence north eighty-three (83) degrees, forty-nine (49) minutes west, in the northerly line of land of Hannah M. and Harden I. Fiske, nine hundred nine and seven-tenths (909.7) feet, to another corner in said boundary line; thence north six (6) degrees, ten (10) minutes east, along said boundary line four hundred six and five-tenths (406.5) feet; thence south eighty-four (84) degrees, fifty (50) minutes east, along said boundary line four hundred (400) feet; thence south forty-one (41) degrees, twenty-six (26) minutes east, along said boundary line five hundred forty-three and seven-tenths (543.7) feet; thence north sixty-five (65) degrees, thirty-seven (37) minutes east, along said boundary line seventy-five (75) feet to a point at an angle in said boundary line and in the westerly line of said Kent-Hope East Road; thence southerly in the westerly line
96 of said road coincident with said boundary line ninety-five and seven-tenths (95.7) feet to the point of beginning;

and said tract of land is shown and delineated on said plat sheet numbered A-9, and said lands and parcels of land are the same as shown and delineated thereon within said tract, express reference to said plat being hereby made for a more complete and several description of said lands and parcels of land.

And said City of Providence takes all said lands and parcels of land which are within said tract and are described in the next preceding paragraph hereof numbered "Eleventh" in fee simple and for a general burial ground for reburying therein the remains found in any burial ground, cemetery, graves or places of human burial, within any lands now or hereafter acquired by said City by purchase or condemnation under the provisions of said Act, which places are to be flowed by water or are located so near to said storage reservoir or any such waterway as to be liable to pollute or reduce the quality or value of any such waters as a potable water supply, and which remains are not elsewhere reinterred in conformity with the provisions of said Act, and for the uses and purposes specified in Section 13 of said Act.

Twelfth. All the waters of said north branch of said Pawtuxet River and its tributaries, included within any and all said lands and parcels of land hereinbefore taken and situated within said area of land hereinbefore described in paragraph numbered "First" herein, and any and all water and flowage rights and privileges appurtenant to or connected with said lands and parcels of land, and any and all waters flowing into said storage reservoir, with the right to hold all said waters and to appropriate and divert the same for said water supply and the water supply purposes specified in said Act, except as hereinafter set forth and provided, and subject to all the conditions, limitations, restrictions, reservations, obligations and requirements relative thereto or any thereof specified in said Act, and especially in Section 6 thereof, and especially subject to the following provisos: Provided, however, that said City of Providence shall not hold or divert any such waters until said storage reservoir is ready for use; and further provided, that from the time when
97 said City begins to hold or store water in said storage reservoir to the time when for the first time twenty billion (20,000,000,000) gallons of water shall have been held and stored therein, said City shall not during any week day diminish the flow of said branch immediately below said dam of said storage reservoir below the amount which would run in said branch if said storage reservoir built by said City did not exist, except that when such flow of said branch would exceed twenty million (20,000,000) gallons per day, said City may hold and store all the water in excess of said twenty million (20,000,000) gallons; and further provided, that after said City has for the first time held and stored in said storage reservoir twenty billion (20,000,000,000) gallons of water, it shall draw from said storage reservoir, in each month a quantity of water equivalent to not less than seventy million (70,000,000) gallons daily, and all the above monthly quantity of water which is not diverted for a water supply for said City of Providence, and for any territories supplied on the date of the passage of said Act, or thereafter supplied under the provisions of said Act, in the City of Cranston, the towns of North Providence, Johnston and Warwick, or elsewhere, shall be discharged into said branch above the dam of the Hope Mills, so-called, in the town of Scituate, except that, if in any year said stor-

age reservoir does not fill by the first day of June, thereafter until it does fill, the quantity of water to be drawn as aforesaid for the purposes aforesaid shall be equivalent to not less than sixty-five million (65,000,000) gallons daily, instead of to not less than seventy million (70,000,000) gallons daily; and further provided, that from the time said City begins to use said storage reservoir and to hold or divert any such waters, said City, although observing the aforegoing limitations and requirements, shall not hold or divert the same to any extent that would prevent its observance of the following paramount limitations and requirements: That said City shall forever discharge from said storage reservoir into said branch sufficient water to maintain a flow of water, in said branch below said dam of said storage reservoir, of not less than five hundred thousand (500,000) gallons each day; and such further quantity of water and at such times and in such manner as may be necessary
98 to maintain and so that there be maintained, a flow, in said branch into the pond formed by the Arkwright dam of the Interlaken Mills, so-called, in the Town of Coventry, of not less than six million (6,000,000) gallons each day, except Sunday; and such further quantity of water and at such times and in such manner as may be necessary to maintain and so that there shall be maintained a flow, in said branch at the Clyde Bleachery and Print Works, in the Town of West Warwick, of such quantity not exceeding seventy-two million (72,000,000) gallons in each week, as the owner or owners of said Clyde Bleachery and Print Works from time to time shall certify to be necessary for use therein, and in other buildings owned on the date of the passage of said Act or thereafter owned by him or them on the premises, for manufacturing purposes other than the production of water power.

And said City of Providence takes all said waters and water and flowage rights and privileges to the extent hereinbefore described as taken, absolutely, and for said water supply for the City of Providence, and for the territories supplied on the date of the passage of said Act in the City of Cranston and towns of North Providence, Johnston and Warwick, and for any territories which thereafter may be supplied and to the extent that they may be supplied under the provisions of Section 18 of said Act which reads as follows:

"Sec. 18. Said town of Scituate, the City of Cranston, and each water or fire district therein now or hereafter incorporated, and each other town, city or water or fire district now or hereafter incorporated having any of its territory included in the drainage district of said north branch of said Pawtuxet river, or of the drainage district of said Pawtuxet river below the junction of the north and south branches of said river, shall have the right to take and receive water from said storage reservoir or reservoirs, said aqueduct or the reservoir of said city at said Sockanosset, for use for domestic, fire and other ordinary municipal water supply purposes in the town of Scituate or the City of Cranston, or such water or fire district therein, or in any part or parts of such territory or territories of such other town, city or water or fire district as are included in either of said

drainage districts where there is no public water supply being
99 furnished by any public or quasi public body or corporation at the time such town, city or water district decides to take such water. The town of Warwick or any water or fire district therein shall have the further right to take and receive water as aforesaid for use as aforesaid in any part of its territory lying easterly of the New York, Providence and Boston railroad line of the New York, New Haven and Hartford Railroad Company and northerly of Greenwich bay, where there is no public water supply being furnished as aforesaid. Proper connections with said water supply source or sources, including the installation of proper meters or other devices for ascertaining the quantity of water so taken, shall be made at such suitable location or locations as shall be approved by the officer or officers in charge of the water works of said City of Providence, and at the expense of the town, city or district desiring to take such water, and subject to such reasonable rules and regulations as from time to time may be made by said City of Providence or its duly authorized officer or officers in charge of its water works. Such town, city or water or fire district shall have the right to take such water as aforesaid to any extent each month not exceeding an average per day of one hundred gallons per capita of the number of inhabitants of such parts of its territory or territories as are served from such water supply source or sources, as such number of inhabitants was shown by the last preceding census of the United States or of the state of Rhode Island, unless and to the extent and for the time only that said officer or officers of said City of Providence shall consent to the taking by such town, city or water or fire district of a greater quantity of such water. Such town, city or water or fire district shall pay to said City of Providence such fair wholesale rates or charges for the quantity of water taken by it as aforesaid, and at such times, and the rates fixed to continue during such periods, as may be mutually agreed upon, or in default of agreement as shall be determined by three arbitrators, one to be chosen by it, one by said City of Providence and the third by the two so chosen, or in case either party should refuse or neglect to appoint such arbitrator, or in case the two arbitrators chosen
100 by the parties should refuse or neglect to appoint the third arbitrator, the Superior Court for Providence county, upon petition of either party and after giving the other party opportunity to be heard, shall appoint such arbitrator or such third arbitrator as the case may be. Said City of Providence may furnish water from such water supply source or sources to any incorporated water company for use as aforesaid in any territory included in either of said drainage districts, where at the time of beginning to furnish such water there is no public water supply, whether by a public or quasi public body or corporation other than the water supply of such water company, in any part of the territory that is supplied by such water company, or for use as aforesaid in said territory in Warwick easterly of said railroad line and northerly of said Greenwich bay."

And in taking said waters and water and flowage rights and privileges as aforesaid said City of Providence includes any and all riparian rights thereto or therein which are appurtenant, attached or incident to any and all the riparian lands, situated on said north branch of said Pawtuxet river, below said dam of said storage reservoir located near and south of said Kent, in the Towns of Scituate, Coventry and West Warwick and the City of Cranston, and situated on said Pawtuxet river, below the junction of said north branch and the south branch of said river, in the Towns of West Warwick and Warwick and the City of Cranston, to the extent that said rights are taken by said taking to the extent hereinbefore described and limited.

And any and all the aforesaid takings herein or hereunder of any and all lands, or interests therein, included in any and all public highways or roads, or parts thereof, in which the public highway easement is not permitted to be taken under said Act, are hereby expressly made subject to such public highway easement.

And although the measurements given herein and the measurements and areas given or shown on said plat are believed to be approximately correct, yet all the lands described or delineated as included in any and all the takings herein or hereunder are hereby taken as aforesaid, whether said measurements or areas are
101 greater or less than given or shown herein or on said plat.

JOSEPH H. GAINER,
Mayor of the City of Providence.

A true copy.

Attest:
T. FREDERICK CHASE,
City Sergeant of the City of Providence.

102 STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS,
Providence, sc:

[L. S.]

To City of Providence, a municipal corporation; Walter L. Clarke, of Providence, city treasurer thereof; B. Thomas Potter, William P. Vaughn, William B. Schofield, John Kelso, Joseph H. Gainer, Henry A. Grimwood, and Walter F. Slade, all of said Providence, constituting the Water Supply Board of said City of Providence, Greeting:

We command that you appear before our Superior Court, at Providence, within the County of Providence, on the 18" day of April, A. D. 1921, then and there to answer to a bill of complaint exhibited against you in our said Court by Theresa B. Joslin of Scituate in said County and State and to do, and to receive what our said Court shall then and there consider in that behalf.

Hereof fail not, under the pains and penalties of the law in that behalf provided. And the Sheriff of said County of Providence, or his deputy, or the Sheriffs, or their deputies of other Counties, are

hereby commanded to make service of this Writ, by reading the same to the said Respondents or by leaving a true and attested copy thereof in the hands or possession or at the last and usual place of abode of each of them forthwith and upon said respondent corporation according to law.

Hereof make true return on or before said 18" day of April A. D. 1921.

Witness, the Seal of our Superior Court, at Providence, this 11th day of April A. D. 1921.

WALTER S. REYNOLDS,
Clerk.

103 PROVIDENCE, *sc:*

In Providence in said county on this 12th day of April A. D. 1921, I have this day made service of the within Subpœna as within commanded by leaving a true and attested copy of the same with each of the within named respondents in his hands and possession, and upon said respondent corporation by leaving a true and attested copy of the same at the office of the corporation in the hands and possession of Walter L. Clarke, Treasurer, thereof, within my precinct.

HERMAN PASTER,
Deputy Sheriff.

Services	$6.00
Copies	6.00
Travel	.80
	$12.80

[Endorsed:] Eq. No. 5390. Subpœna. Received Apr. 11, 1921. Sheriff's office. Superior Court. Filed Dec. 2, 1921. Walter S. Reynolds, Clerk.

104 STATE OF RHODE ISLAND,
Providence, sc:

Superior Court.

Eq. No. 5390.

THERESA B. JOSLIN

vs.

WALTER L. CLARKE, City Treasurer, et al.

Appearance for the Defendants.

We hereby enter our appearance as Solicitors for all said defendants.

ELMER S. CHACE.
ALBERT A. BAKER.

105 STATE OF RHODE ISLAND,
Providence, sc:

Superior Court.

Eq. No. 5390.

THERESA B. JOSLIN

vs.

WALTER L. CLARKE, City Treasurer, et al.

The Joint and Several Answer of the City of Providence, Walter L. Clarke, City Treasurer Thereof, and B. Thomas Potter, William P. Vaughn, William A. Schofield, John Kelso, Joseph H. Gainer, Henry A. Grimwood, and Walter F. Slade, Constituting the Water Supply Board of said City, Defendants, to the Bill of Complaint of Theresa B. Joslin in the Above-entitled Cause.

These defendants reserving to itself and themselves all benefit of exception to said bill of complaint, for answer thereto or to so much thereof as it and they are advised is material or necessary to make answer unto, say:

1. They admit the allegations contained in paragraph numbered 1 of said bill.

2. They admit the allegations contained in paragraph numbered 2 and the next following paragraph of said bill.

3. They admit the allegations contained in paragraph numbered 3 of said bill.

4. They admit the allegations contained in paragraph numbered 4 of said bill, except the part thereof that said act does not give "any opportunity for the decision of said question by any impartial tribunal," and if this is material and required to be answered, they deny that said board was not an impartial tribunal to decide said question, and aver that said board was duly appointed and constituted by said act as a proper and impartial tribunal or commission to investigate and determine

106 "Whether a part of the north branch of the Pawtuxet River, and the water shed tributary thereto, would be the most available and desirable source for a supply of pure and wholesome water for the City of Providence and for any territories now supplied or hereafter supplied under the provisions of this act by means of the water works of said city * * *."

5. They admit the allegations contained in paragraph numbered 5 of said bill.

6. They admit the allegations contained in paragraph numbered 6 of said bill, except the part thereof that said act does not give any opportunity for an impartial consideration and determination of the necessity for the taking and of what shall be taken, and if this is material and required to be answered, they deny that said act does not give opportunity for an impartial consideration, determination and decision as to the necessity for the taking and what shall be taken by action of the City Council of said City within the authority delegated to it by Section 5 of said act to take any of the lands included within the area described therein, and aver that the necessity of such taking is duly determined and established by and under said act.

7. They admit the allegations contained in paragraph numbered 7 of said bill.

8. They admit the allegations contained in paragraph numbered 8 of said bill, except the part thereof that opportunity is not given for submitting the question of the necessity of the taking to an impartial tribunal, and if this is material and required to be answered, they deny that said act, in empowering said City by action of its City Council to take such waters, water and flowage rights or privileges within the authority delegated to it by Section 6 of said act, and within the limits therein specified, did not give opportunity for the determination thereof by an impartial tribunal, and aver that the necessity of such taking is duly determined and established by and under said act.

9. They admit the allegations contained in paragraph numbered 9 of said bill.

10. They admit the allegations contained in paragraph
107 numbered 10 of said bill, except the part thereof that said act does not provide for the decision by an impartial tribunal of the question of the public necessity for such new highways or relocation of parts of existing highways, and this they deny, and aver that said Section 8 of said act under certain conditions requires said City to lay out said new highways and relocated parts of existing highways, and specified the general locations thereof, and makes the particular locations thereof subject to the prior approval of the State Board of Public Roads or of the Town Council of Scituate, all as set forth in detail in said Section 8, and aver that the necessity of such taking is duly determined and established by and under said act.

11. They admit the allegations contained in paragraph numbered 11 and the next following paragraph of said bill.

12. They deny the allegations contained in paragraph numbered 12 of said bill, but if the word "furnishing" therein is used in the sense of creating or establishing said water supply, they aver that said allegations are immaterial and that they are not required to answer the same.

13. They admit the allegations contained in paragraph numbered 13 of said bill.

14. They deny the allegations contained in paragraph numbered 14 of said bill, and aver that the reasonableness of the taking of such lands and the purpose for which the land is held, is determined and established by and under said act.

15. They admit the allegations contained in paragraph numbered 15 of said bill.

16. They admit the allegations contained in paragraph numbered 16 of said bill.

17. They admit the allegations contained in paragraph numbered 17 of said bill, except the part thereof that said act does not give opportunity for the determination of the public necessity of such taking to be passed on by any disinterested tribunal, and if
108 this is material and required to be answered, they deny that said act, in empowering said City by action of said City Council to make such taking within the authority delegated to it and subject to the limitations prescribed therein does not give opportunity for the determination thereof by a disinterested tribunal, and aver that the public necessity of such taking is duly determined and established by and under said act.

18. They admit the allegations contained in paragraph numbered 18 of said bill.

19. As to the allegations contained in paragraph numbered 19 of said bill, they aver that the same are immaterial and that they are not required to answer the same.

20. They admit the allegations contained in paragraph numbered 20 of said bill as substantially correct, but refer to said act for a more exact and complete statement of said provisions.

21. They admit the allegations contained in paragraph numbered 21 of said bill as substantially correct, but refer to said act for a more complete and exact statement of said provisions.

22. As to the allegations contained in paragraph numbered 22 of said bill, they aver that the same are immaterial and that they are not required to answer the same.

23. They admit the allegations contained in paragraph numbered 23 of said bill which set forth provisions of Section 23 of said act. As to the other allegations contained therein they aver that the same are immaterial and that they are not required to answer the same.

24. They admit the allegations contained in paragraph numbered 24 of said bill.

25. They aver that the allegations contained in paragraph numbered 25 of said bill are immaterial, ignore relevant provisions of the act set forth in said bill and allege conclusions of law, and
109 that they are not required to answer the same, but if and so far as any of the same are material and required to be answered, they deny the same.

26. They admit the allegations contained in paragraph numbered 26 of said bill.

27. They admit the allegations contained in paragraph numbered 27 of said bill.

28. They admit the allegations contained in paragraph numbered 28 of said bill.

29. They admit the allegations contained in paragraph numbered 29 of said bill, except they deny that said resolution and statement and plat does not designate any special purpose or purposes as the occasion of the taking of any specific parcel or parcels.

30. They admit the allegations contained in paragraph numbered 30 of said bill.

31. As to the allegations contained in paragraph numbered 31 of said bill they aver that they have no knowledge or information sufficient to form a belief as to the same, and therefore neither admit nor deny the same but leave the complainant to make proof thereof as she may be advised.

32. They admit the allegations contained in paragraph numbered 32 of said bill.

33. They admit the allegations contained in paragraph numbered 33 of said bill.

34. They admit the allegations contained in paragraph numbered 34 of said bill.

35. They admit the allegations contained in paragraph numbered 35 of said bill.

36. They admit the allegations contained in paragraph numbered 36 of said bill.

37. They admit the allegations contained in paragraph numbered 37 of said bill.

38. They admit the allegations contained in paragraph numbered 38 of said bill.

110 39. They admit the allegations contained in paragraph numbered 39 of said bill.

40. They admit the allegations of fact contained in paragraph numbered 40 and the next following paragraph of said bill.

41. As to the allegations contained in paragraph numbered 41 of said bill, they admit that said City has acquired by purchase divers tracts of land within the condemned area, and aver that before said condemnation it so acquired more than five thousand acres of land with the buildings and improvements thereon, and since said condemnation has settled with the owners of about three thousand acres of land and the buildings and improvements thereon within the con-

demned areas, including the owners of two mills and mill villages therein, without any question of the legality or regularity of the condemnation being raised by any one, and after said complainant questioned the constitutionality of said act has settled with the owners of about twenty two hundred and fifty more acres of land, making a total of about ten thousand two hundred and fifty acres paid for out of a total of about fourteen thousand four hundred and twenty five acres purchased or condemned.

42. They admit the allegations contained in paragraph numbered 42 of said bill, except they aver that the part of the dam which was under construction has been completed, but the work of constructing the entire main dam will probably require about four years more, and that the City will be able to take water for water supply purposes from said reservoir about one year later than the completion of said main dam.

43. They admit the allegations contained in paragraph numbered 43 of said bill, except they deny that said City has no need for taking possession of said orator's properties until said dam is nearly or quite completed, and aver on information and belief that the complainant at the time of said taking was the owner of various extensive
111 tracts of land, which in part are included within the location of said reservoir as planned and in part within the locations of the various new highways and relocated highways which are required by and under said act to be laid out and constructed, and aver that the same will be required to be used in the construction of said reservoir and the improvement of the lands therein therefor and the construction of said highways long before said dam shall be completed.

44. They deny the allegations contained in paragraph numbered 44 of said bill and the conclusions of law therein averred.

45. As to the allegations contained in paragraph numbered 45 of said bill, if material and required to be answered, they deny the same and the allegation that the taking of said complainant's property and of said mills was not necessary for the purposes of said act, and aver that the necessity of taking the same was duly determined and established by and under said act.

46. They deny the allegations contained in paragraph numbered 46 of said bill and the conclusions of law therein alleged.

47. They deny the allegations contained in paragraph numbered 47 of said bill and the conclusions of law therein averred.

48. As to the allegations contained in paragraph numbered 48 of said bill, they aver in view of said act and the terms and provisions thereof for supplying said other communities with water for due consideration to said City, that said allegations are immaterial and that they are not required to answer the same.

49. As to the allegations contained in paragraph numbered 49 of said bill, they aver that the same are immaterial and that they are not required to answer the same.

50. As to the allegations contained in paragraph numbered 50 of said bill, they aver that there is no equity in favor of the
112 complainant to restrain said City from taking such possession at any time after one year from such taking as expressly authorized by said act.

51. As to the allegations contained in paragraph numbered 51 of said bill, they aver that the same are immaterial and that they are not required to answer the same.

52. And these defendants further answering as to the allegations contained in paragraphs numbered "12," "47" and "48" of said bill relative to the provisions of Section 18 of said act, say that said territories therein described, and for which a public water supply may be obtained in accordance with said section, are dependent for a public water supply in whole or in part upon said north branch of the Pawtuxet River or said Pawtuxet River below the junction of the north and south branches thereof, and that their natural and equitable right to have such a supply was recognized by the Legislature and the City Council of Providence, and that the provisions of said Section 18 were not adversely imposed upon said City, but as directed by resolution of the City Council of said City, approved March 16, 1915, the City Solicitor thereof applied to the Legislature for the passage of said act, including said Section 18, said resolution being numbered 120, series of 1915, and the following being a copy thereof; viz:

"Resolution Directing the City Solicitor to Apply for Legislation to Provide for Furnishing the City of Providence With a Supply of Pure Water.

"Resolved, That the City Solicitor is hereby directed to apply to the General Assembly for the passage of such legislation as will provide for furnishing the City of Providence with a supply of pure water, substantially in conformity with the accompanying draft act."

and the following being a copy of Section 18 of said accompanying draft act, viz:

113 "Sec. 18. Said town of Scituate and each water or fire district therein now or hereafter incorporated, and each other town, city or water or fire district now or hereafter incorporated having any of its territory included in the drainage district of said north branch of said Pawtuxet River, or of the drainage district of said Pawtuxet River below the junction of the north and south branches of said river, shall have the right to take and receive water from said storage reservoir or reservoirs, said aqueduct or the reservoir of said city at said Sockanosset, for use for domestic, fire and other ordinary municipal water supply purposes in the town of Scituate or such

water or fire district therein, or in any part or parts of such territory or territories of such other town, city or water or fire district as are included in either of said drainage districts, where there is no public water supply being furnished by any public or quasi public body or corporation at the time such town, city or water district decides to take such water. The town of Warwick or any water or fire district therein shall have the further right to take and receive water as aforesaid for use as aforesaid in any parts of its territory lying easterly of the New York, Providence and Boston railroad line of the New York, New Haven and Hartford Railroad Company and northerly of Greenwich bay, where there is no public water supply being furnished as aforesaid. Proper connections with said water supply source or sources, including the installation of proper meters or other devices for ascertaining the quantity of water so taken, shall be made at such suitable location or locations as shall be approved by the officer or officers in charge of the water works of said city of Providence, and at the expense of the town, city or district desiring to take such water, and subject to such reasonable rules and regulations as from time to time may be made by said city of Providence or its duly authorized officer or officers in charge of its water works. Such town, city or water district shall have the right to take such water as aforesaid to any extent each month not exceeding an average per day of one hundred gallons per capita of the number of inhabitants of such parts of its territory or territories as are served from such water supply source or sources, as such number of inhabitants was shown by the last preceding census of the United States or of the State of Rhode Island, unless and to the extent and for the time only that said officer or officers of said city of Providence shall consent to the taking by such town, city or water or fire district of a greater quantity of such water. Such town, city or water or fire district shall pay to said city of Providence such fair wholesale rates or charges for the quantity of water taken by it as aforesaid, and at such times, and the rates fixed to continue during such periods, as may be mutually agreed upon, or in default of agreement as shall be determined by three arbitrators, one to be chosen by it, one by said city of Providence and the third by the two so chosen, or in case either party should refuse or neglect to appoint such arbitrator, or in case the two arbitrators chosen by the parties should refuse or neglect to appoint the third arbitrator, said superior court for Providence county, upon petition of either party and after giving the other party opportunity to be heard, shall appoint such arbitrator or such third arbitrator as the case may be. Said City of Providence may furnish water from such water supply source or sources to any incorporated water company for use as aforesaid in any territory included in either of said drainage districts, where at the time of beginning to furnish such water there is no public water supply, whether by a public or quasi public body or corporation other than the water supply of such water company, in any part of the territory that is supplied by such water company, or for use as aforesaid in said territory in Warwick easterly of said railroad line and northerly of said Greenwich bay."

114 And these defendants further say that said territories which have no public water supply, and which have the right to obtain a water supply from said source or sources, comprise for the most part agricultural communities of small population, and include several mill villages, and the territory in Warwick lying easterly of the railroad line and northerly of Greenwich bay is occupied almost wholly by summer residences, and the total population of said territories not supplied which have said water supply right, as estimated in view of the Rhode Island State Census of 1915 and the United States Census of 1920, was and is approximately nineteen thousand, while the population of said city of Providence and the other territories or parts thereof supplied by the water works of said city at the time of the passage of said act on April 21, 1915, was approximately two hundred and seventy thousand, and now is about the same, and on account of the territories having such water supply right comprising for the most part rural communities, it would be on account of the prohibitive cost of installing a water distributing system impracticable for a large part of said nineteen thousand population to have a public water supply furnished them, and that to any extent that such territories should not take water from said source, the same would not be detrimental to, but would be beneficial to said city, as the water supply provided by and under said Act will, as is estimated by hydraulic engineers, be sufficient to supply the demands of the territories now supplied by the water works of said city only until about the year 1965.

And that said City Council had power to act in the premises and to apply for and to accept said act by virtue of either its public legislative powers or its private powers, or both, and under Section II, of the Charter of said city the administration of the fiscal, prudential and municipal affairs of said city, with the conduct and government thereof, was vested in said City Council at the time of the passage of its said resolution and at the time of the ac-
115 ceptance of said act, said Section II of said City Charter reading as follows:

Section II.

"Clause 1. The administration of all the fiscal, prudential and municipal affairs of said city, with the conduct and government thereof, shall be vested in one principal officer to be styled the mayor; one council of ten persons to be styled the aldermen; and one council of forty persons to be styled the common council; together with such other magistrates or officers as are hereinafter specified, or by the laws of this state or the ordinances of the said city are, or hereafter may be, authorized or prescribed."

"Clause 2. The mayor, aldermen, and common council, in their joint capacity, shall be styled the City Council."

53. And these respondents deny that any other matter, cause or thing in said bill contained, material or necessary for these respondents to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, avoided or denied, is true to

the knowledge, information or belief of these respondents, all of which matters and things these respondents are ready and willing to aver, maintain and prove as this Honorable Court may direct, and pray that the said complainant may be decreed to pay to them such of their costs of this suit as are properly allowable to them.

CITY OF PROVIDENCE,
By JOSEPH H. GAINER,
Mayor.
ALL THE OTHER SAID RESPONDENTS,
By Their Solicitors, ELMER S. CHACE,
ALBERT A. BAKER.

ELMER S. CHACE,
ALBERT A. BAKER,
Solicitors for the Respondents.

116 STATE OF RHODE ISLAND,
Providence sc:

Superior Court.

Eq. No. 5390.

THERESA B. JOSLIN

vs.

WALTER L. CLARKE, City Treasurer, et al.

The Attention of the Court is Called to a Constitutional Question on the Record.

The defendant City of Providence and the other said defendants call the attention of the Court to the fact that the constitutionality of an act of the General Assembly is clearly questioned by allegations of said bill of complaint, and is brought in question upon the record, and to the provisions of Section 1 of Chapter 298 of the General Laws.

By Their Solicitors, ELMER S. CHACE.
ALBERT A. BAKER.

117 STATE OF RHODE ISLAND,
Providence sc:

Superior Court.

Eq. No. 5390.

THERESA B. JOSLIN

vs.

WALTER L. CLARKE, City Treasurer, et al.

Order Certifying Constitutional Questions to the Supreme Court.

In the above entitled cause, it appearing that the constitutionality of an act of the General Assembly is clearly questioned by allegations of said bill of complaint and is brought in question upon the record, it is hereby ordered that said questions be and hereby are certified to the Supreme Court to be heard and determined, and that the entire record in said cause be forthwith transmitted to said Supreme Court.

Entered as the order of the Court this 27th day of April, A. D. 1921.

By order,

ROBERT C. ROOT,
Asst. Clerk.

Enter:

BARROWS, *J.*

118 Supreme Court.

C. Q. No. 509.

JOSLIN MANUFACTURING CO.

v.

WALTER L. CLARKE, City Treas., et al.

C. Q. No. 510.

SCITUATE LIGHT & POWER CO.

v.

WALTER L. CLARKE, City Treas., et al.

C. Q. No. 511.

THERESA B. JOSLIN

v.

WALTER L. CLARKE, City Treas., et al.

Opinion.

STEARNS, *J.*:

The proceedings in each of these causes is by a bill in equity, which was brought in the Superior Court to restrain the City of Providence, its agents and servants, from taking possession of or interfering with the property of the complainants. The constitutionality of an act of the General Assembly having been brought in question by the pleadings and upon the record, the three causes were then certified to this court for the determination of the constitional questions, in accordance with the provision of Chapter 298, Sec. 1, Gen. Laws.

The statute in question is Chapter 1278 of the Public Laws, which is entitled, "An Act to furnish the City of Providence with a Supply of Pure Water." The claim is that the statute is unconstitutional in that it violates the provisions of Articles V and XIV of the Amendments of the Constitution of the United States.

In Joslin Mfg. Co. v. Clarke, 41 R. I. 350, decided in 1918, in proceedings between the same parties and upon the same statement of facts as in the present proceedings, we held that said Chapter 1278 was not unconstitutional and was not in conflict with the pro-
119 visions of Sections 5 or 10 of Article 1 of the Constitution of Rhode Island or with the provisions of Article XIV of the Amendments of the Constitution of the United States.

In the present proceedings it is not now claimed that the act is in violation of any provision of the state constitution, but the claim is that the act is in violation of Article V and Article XIV of the

Amendments of the federal constitution. The only new question thus raised is, Is the act in violation of the provisions of Article V of the Amendments of the Constitution of the United States? The first ten amendments to the federal constitution are restrictions on the powers of the federal government and not upon the powers of the state governments. State v. Paul, 5 R. I. 185 (1858); State v. Keeran, 5 R. I. 497; State v. Flynn, 16 R. I. 10; In re Liquors of Fitzpatrick, 16 R. I. 60; State v. Brown & Sharpe Mfg. Co., 18 R. I. 16; Shaw v. Silverstein, 21 R. I. 500; Opinion to the Governor, 21 R. I. 582; State v. Armeno, 29 R. I. 431; East Shore Land Co. v. Peckham et al. 33 R. I. 541; Barron v. The Mayor & City Council of Baltimore, 7 Peters, 247 (1833). In U. S. v. Cruikshank et al., 92 U. S. 542 (1875), Chief Justice Waite, speaking of the first ten amendments, said that they were not intended to limit the powers of the State governments in respect to their own citizens but to operate upon the national government alone and after citing authorities continued as follows: "It is now too late to question the correctness of this construction. As was said by the late Chief Justice, in Twitchell v. the Commonwealth, 7 Wall. 325, 'the scope and application of these amendments are no longer subjects of discussion here.'" See also, Spies v. Illinois, 123 U. S. 166; Brown v. New Jersey, 175 U. S. 174; Twining v. New Jersey, 211 U. S. 78, and cases cited therein.

Our decision is that said Chapter 1278 is not in violation of either Article V or XIV of the Amendments of the Constitution of
120 the United States.

The papers in these causes with our decision certified thereon are ordered to be sent back to the Superior Court for further proceedings.

A true copy.
Attest:
BERTRAM S. BLAISDELL,
Clerk.

121 STATE OF RHODE ISLAND,
Providence, sc:

Superior Court.

Eq. No. 5390.

THERESA B. JOSLIN

v

WALTER L. CLARKE, City Treasurer, et al.

Decree.

This cause came on to be heard upon the complainant's bill of complaint and was argued by counsel, and thereupon, upon consideration thereof, pursuant to the decision of the Supreme Court in

this cause, C. Q. No. 511, it is ordered, adjudged and decreed that said bill be dismissed, and that the respondents recover from the complainant such costs as shall be properly taxed by the clerk.

Enter- as decree of Court this 12th day of August, 1921.

By order,

H. M. PAINE,
Asst. Clerk.

Enter:

SUMNER, *J.*

122 STATE OF RHODE ISLAND,
Providence, sc:

Office of the Clerk of the Superior Court.

Equity. No. 5390.

THERESA B. JOSLIN

vs.

WALTER L. CLARKE, City Treasurer, et al.

I, Walter S. Reynolds, Clerk of the Superior Court of said State for the Counties of Providence and Bristol, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the above entitled cause, and also of the opinion of the Supreme Court of said State as attested by the Clerk of said Supreme Court, as the same now appears on file in my said office, in accordance with the præcipe filed by the plaintiff in error and the stipulation herein.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Superior Court at Providence, in said County of Providence, on this sixth day of December, A. D. 1921.

[Seal of Superior Court of the State of Rhode Island, Providence Plantations, Providence County.]

WALTER S. REYNOLDS,
Clerk.

123 Superior Court of the State of Rhode Island, &c., for the Counties of Providence and Bristol.

Eq. No. 5390.

THERESA B. JOSLIN

vs.

WALTER L. CLARKE, City Treasurer, et al.

Assignments of Error.

And now comes Theresa B. Joslin, Petitioner and Plaintiff in Error by her attorneys, and in connection with her petition for a Writ of Error shows that, in the record and proceedings and in the rendering of final decree of the Superior Court of the State of Rhode Island in the above entitled cause, manifest error has intervened to the prejudice of the above named Petitioner and Plaintiff in Error in this, to wit:

1. That the Supreme Court of Rhode Island in its opinion and the Superior Court of Rhode Island, in its final decree dismissing the bill of complaint herein pursuant to the opinion of the said Supreme Court, erred in holding and deciding that Chapter 1278 of the Public Laws of the State of Rhode Island, passed by the General Assembly of said State, at its January session, A. D. 1915, entitled, "An Act to Furnish the City of Providence with a Supply of Pure Water," approved April 21, 1915, does not violate Article V of the Amendments to the Constitution of the United States and

(*a*) does not deprive the plaintiff in error of her property without due process of law, and

(*b*) does not authorize the taking of the property of plaintiff in error for a public use without just compensation.

2. That the Supreme Court of Rhode Island in its opinion and the Superior Court of Rhode Island, in its final decree dismissing the bill of complaint herein pursuant to the opinion of the said Supreme Court, erred in holding and deciding that Chapter 1278 of the Public Laws of the State of Rhode Island, passed by the General Assembly of said State, at its January session, A. D. 1915,
124 entitled, "An Act to Furnish the City of Providence with a Supply of Pure Water," approved April 21, 1915, does not violate Article XIV of the Amendments to the Constitution of the United States, and

(*a*) does not deprive the plaintiff in error of the equal protection of the laws, and

(*b*) does not deprive the plaintiff in error of her property without due process of law.

3. That the Supreme Court of Rhode Island in its opinion and the Superior Court of Rhode Island, in its final decree dismissing the bill of complaint herein pursuant to the opinion of the said Supreme Court, erred in refusing to hold and decide that Sections 1, 3, 4, 5, 6, 8, 21, 23 and 26 of said Chapter 1278 of said Public Laws of Rhode Island, are repugnant to Article XIV of the Amendments to the Constitution of the United States in that

(*a*) plaintiff in error is thereby deprived of her property without due process of law and

(*b*) is thereby deprived of the equal protection of the laws.

4. That the Supreme Court of Rhode Island in its opinion and the Superior Court of Rhode Island, in its final decree dismissing the bill of complaint herein pursuant to the opinion of the said Supreme Court, erred in refusing to hold and decide that Chapter 1278 of the Public Laws of the State of Rhode Island passed by the General Assembly of said State at its January session, A. D. 1915, entitled "An Act to Furnish the City of Providence with a Supply of Pure Water," approved April 21, 1915, violates Article XIV of the Amendments to the Constitution of the United States, and deprives the plaintiff in error of her property without due process of law, and deprives the plaintiff in error of the equal protection of the laws, in that

125 (*a*) her property is allowed by the provisions of said Act, to be taken by the City of Providence under color of eminent domain, when the questions of the necessity of the taking as a whole or of the taking of the various parcels which are taken, have not been decided by the Legislature itself, but have been relegated to the City of Providence to decide ex parte, without appeal, and without an opportunity to have said questions heard and decided by an impartial tribunal.

(*b*) said Act purports to authorize the City of Providence to take possession of plaintiff's property and dispose of the same without offering any compensation therefor, or having any value determined before said taking.

(*c*) said Act purports to make the Water Supply Board of the City of Providence created thereunder, sole judge of the question as to whether a part of the north branch of the Pawtuxet River and the watershed tributary thereto, is the most available and desirable source of water supply for said city, without appeal and without any opportunity for the decision of said question by an impartial tribunal.

(*d*) said Act purports to make the City Council of the City of Providence, sole judge of the necessity for the taking of the property of the plaintiff in error and of the extent of such taking, without right on the part of the plaintiff in error to be heard to say that the public use may be fully subserved without taking the property of the plaintiff in error or some part thereof.

(*e*) said Act purports to vest in the City Council of the City of Providence, the right to make final decision as to the necessity for taking the property of the plaintiff in error, and the extent of such taking, upon the ex parte judgment of said City Council.

126 (*f*) said Act purports to vest in the City of Providence the right to make final decision as to the reasonableness of the taking of the lands purported to be condemned under the Act and as to the purpose for which such lands are held, without appeal therefrom to any disinterested tribunal.

(*g*) said Act purports to permit the City of Providence to take possession of, and use, the property of the plaintiff in error, and to rent, sell and dispose of the same, without offering any compensation therefor, or having any compensation therefor permenently or tentatively determined.

(*h*) said Act fails to provide for a determination by an impartial appraisal of the value of the land of the plaintiff in error before the same is or might be taken, under the power of eminent domain.

(*i*) said Act and especially Section 12 thereof, while providing for payment of the reasonable cost of removing machinery located on property purported to be condemned, to a new location within the New England States, makes no provision for the payment of such reasonable cost of removal to a new location outside of the New England States, although such location outside of the New England States shall be the most available place for its use and although such reasonable cost of removal to such new location outside of the New England States, shall not exceed the cost of removal to a suitable new location within the New England States.

(*j*) said Act and especially Section 16 thereof, while providing for the recovery of damages by the owner or owners of any business located on land purported to be taken by said City under said Act which was established prior to the passage of said Act, makes no provision for the recovery of such damages for any such business which was in good faith established after the passage of said Act, but prior to the purported taking of said land by said City.

127 (*k*) said Act makes no provision for the postponement of the claim for a determination of damages for property purported to be taken under the Act until the right or authority of the City to take, and the regularity and propriety of such taking, have been determined by some judicial tribunal.

(*l*) said Act permits the tax payers of the City of Providence to be burdened by a large and unnecessary expenditure which is not wholly for the benefit of said City, but is in part for the benefit of other municipalities or companies outside of said City, which do not contribute to any portion of the expenditure for said water supply.

(*m*) the provisions of said Act, and particularly Section 18 thereof, by which certain municipalities and water and fire districts, which are located in the drainage district referred to in said Act, are given the right to take and receive certain limited amounts of water on certain terms and conditions specified in said Act, are unreasonable and unjust.

By reason whereof, this petitioner and plaintiff in error prays that the said decree of the Superior Court of the State of Rhode Island dated August 12, 1921 may be reversed, annulled and altogether held for nothing and that this petitioner and plaintiff in error may have such other and further relief according to law as to the court may seem just and proper.

Dated at Providence, Rhode Island, this 10th day of November, A.D. 1921.

ROBERT H. McCARTER,
JAMES HARRIS,
FRANCIS I. McCANNA,
ALFRED G. CHAFFEE,
Attorneys for Petitioner and Plaintiff in Error.

128 [Endorsed:] Eq. No. 5390. Theresa B. Joslin vs. Walter L. Clarke, City Treasurer, et al. Assignment of Error. Superior Court. Filed Nov. 10, 1921. Walter S. Reynolds, Clerk. Alfred G. Chaffee, Attorney at Law.

129 Superior Court of the State of Rhode Island, &c., for the Counties of Providence and Bristol.

Eq. No. 5390.

THERESA B. JOSLIN

vs.

WALTER L. CLARKE, City Treasurer, et al.

Petition for Writ of Error.

The petition of Theresa B. Joslin by Robert H. McCarter, James Harris, Francis I. McCanna and Alfred G. Chaffee, her attorneys, respectfully shows:

1. That on the 12th day of August, 1921 a final decree dismissing the bill of complaint hereinafter referred to and thereby upholding the constitutionality of the Act of the Legislature of the State of Rhode Island hereinafter referred to, was duly entered by the Superior Court of the State of Rhode Island pursuant to the opinion of the Supreme Court of the State of Rhode Island, the court of last resort therein, (the record from the said the Supreme Court of Rhode Island having been remitted to the Superior Court where the same

now remains) in a suit in equity wherein the said Theresa B. Joslin was complainant and the City of Providence, a municipal corporation duly created by virtue of and under the laws of the State of Rhode Island, Walter L. Clarke as he is City Treasurer of said City of Providence, B. Thomas Potter, William P. Vaughn, William A. Schofield, John Kelso, Joseph H. Gainer, Henry A. Grimwood and Walter F. Slade, constituting the Water Supply Board of said city, were respondents.

2. That this is a bill of complaint seeking to restrain the respondents from taking possession of complainant's property, comprising her mansion house and summer residence, with numerous and valuable buildings and improvements thereon; together with the waters, water rights and privileges connected therewith, lo-
130 cated within the drainage district or area which the City of Providence claims to be authorized to condemn and take under the provisions of Chapter 1278 of the Public Laws of Rhode Island, passed at the January session of the General Assembly of the State of Rhode Island, A. D. 1915, entitled, "An Act to furnish the City of Providence with a supply of pure water," approved April 12, 1915, the complainant alleging that said act is unconstitutional and void, in that it violates the provisions of Article V of the Amendments to the Constitution of the United States, in that under its provisions the private property of the complainant is being taken for a public use without just compensation, and in that it violates the provisions of Article XIV of the Amendments to the Constitution of the United States, in that under its provisions the complainant is deprived of her property without due process of law, without remedy by recourse to law, and is denied the equal protection of the laws; and that any taking of complainant's property under the purported authorization of the provisions of Chapter 1278 of said Public Laws is unconstitutional, unlawful and void, and would amount to a confiscation thereof.

The respondents, by way of answer, have averred that said act is constitutional and valid, and that they are authorized by virtue of the provisions thereof to enter upon, condemn and take complainant's property in fee simple for the purposes specified in said act, and that pursuant to the provisions of said act the property of the complainant, together with that of other owners within the drainage district above referred to, has been duly condemned, and that it is the purpose of the respondents to take possession of the same under the purported authority of said act.

131 And your petitioner avers that in said bill of complaint she expressly charged that said act is unconstitutional and void, in that it violates the provisions of Article V of the Amendments to the Constitution of the United States, in that under its provisions the private property of the complainant is being taken for a public use without just compensation, and in that it violates the provisions of Article XIV of the Amendments to the Constitution of the United States, in that under the provisions of the act your petitioner is deprived of her property without due process of law, without remedy by recourse to the laws, conformably to the laws, or by the law of the

land, in that her property is allowed to be taken under color of eminent domain by the City of Providence acting under said Act, when the questions of the necessity of the taking as a whole or of the various parcels which are purported to be taken, have not been decided by the Legislature itself, but have been relegated to the City of Providence to decide ex parte, without appeal, and without an opportunity to have said questions heard and decided by an impartial tribunal; that said act is unconstitutional and void, in that it violates the provisions aforesaid of the Constitution of the United States, in that it permits the tax payers of the City of Providence to be burdened by a large and unnecessary expenditure and by an expenditure which is not wholly for the benefit of said City of Providence, but in part for the benefit of other municipalities, outside of the City of Providence which do not contribute to any portion of the expenditure for said water supply, your petitioner averring that she is a large tax payer in said City of Providence, and is interested in the foregoing questions as such tax payer, as well as a person
132 whose property is purported to be taken under the act; that said act is unconstitutional and void in that it violates said Articles V and XIV of the Amendments to the Constitution of the United States by denying to the petitioner as a person within the jurisdiction of the State of Rhode Island the equal protection of the laws, and depriving her of her property without just compensation.

And your petitioner further avers, that in the aforesaid judgment and proceedings certain errors were committed to the prejudice of your petitioner, all of which will more fully appear from the assignment of errors which is filed herewith.

Wherefore your petitioner prays that a writ of error from the Supreme Court of the United States may issue in this case to the said Superior Court of the State of Rhode Island for the correction of the errors so complained of, and that a transcript of the record and proceedings, and papers in this cause, duly authenticated, be ordered sent to the Supreme Court of the United States, Washington, D. C., as provided by law, and for the usual citation, to the end that, the record and proceedings being inspected, the Supreme Court of the United States may cause further to be done thereon, to correct all errors what of right and according to law and the Constitution of the United States ought to be done; and yo: r petitioner will ever pray.

Dated, Providence, Rhode Island, November 10th, 1921.

ROBERT H. McCARTER,
JAMES HARRIS,
FRANCIS I. McCANNA,
ALFRED G. CHAFFEE,
Attorneys for Theresa B. Joslin, Petitioner and Plaintiff-in-Error.

133 [Endorsed:] Eq. No. 5390. Theresa B. Joslin vs. Walter L. Clarke, City Treasurer, et al. Petition for Writ of Error. Superior Court. Filed Nov. 10, 1921. Walter S Reynolds, Clerk. Alfred G. Chaffee, Attorney at Law.

134 Superior Court of the State of Rhode Island, &c., for the Counties of Providence and Bristol.

Eq. No. 5390.

THERESA B. JOSLIN

vs.

WALTER L. CLARKE, City Treasurer, et al.

Order Allowing Writ of Error.

On reading of the petition of Theresa B. Joslin for writ of error, and the assignment of errors, and upon due consideration of the record in said cause;

It is ordered, that a writ of error be allowed from the Supreme Court of the United States to the Superior Court of the State of Rhode Island, as prayed for in said petition, and that said writ of error and citation thereon be issued, served and returned to the Supreme Court of the United States, in accordance with law, upon condition that said petitioner and plaintiff in error give security in the sum of One thousand Dollars, that the said plaintiff in error shall prosecute said writ of error to effect, and, if said plaintiff in error fail to make her plea good, shall answer to the defendants in error for all costs and damages that may be adjudged or decreed on account of said writ of error.

And the said plaintiff in error now presenting a bond in the sum of One thousand Dollars, with The National Surety Company of New York as surety, it is ordered that the same be and hereby is duly approved.

In witness whereof, I have hereunto set my hand this 10th day of November, nineteen hundred and twenty-one.

W. B. TANNER,
Presiding Justice of the Superior Court of the State of Rhode Island.

135 [Endorsed:] Eq. No. 5390. Theresa B. Joslin vs. Walter L. Clarke, City Treasurer, et al. Order Allowing Writ of Error. Superior Court. Filed Nov. 10, 1921. Walter S. Reynolds. Clerk. Alfred G. Chaffee, Attorney at Law.

136 *Bond.*

Know all men by these presents that we, Theresa B. Joslin, of the Town of Scituate, County of Providence, State of Rhode Island, as Principal, and The National Surety Company of New York, as Surety, are held and firmly bound unto the City of Providence a municipal corporation duly created by virtue of and under the laws of the State of Rhode Island, Walter L. Clarke, as he is City Treasurer of the City of Providence, B. Thomas Potter, William P.

Vaughn, William A. Schofield, John Kelso, Joseph H. Gainer, Henry A. Grimwood and Walter F. Slade, all of the said City of Providence, in the full and just sum of one thousand dollars, to be paid to the said City of Providence, Walter L. Clarke, B. Thomas Potter, William P. Vaughn, William A. Schofield, John Kelso, Joseph H. Gainer, Henry A. Grimwood and Walter F. Slade, their respective heirs, executors, administrators, successors or assigns; to which payment well and truly to be made, we bind ourselves, our respective heirs, executors, administrators, successors and assigns, jointly and severally by these presents. Sealed with our seals and dated the 8th day of November, in the year of Our Lord One Thousand Nine Hundred and Twenty-one.

Whereas the above named plaintiff-in-error, Theresa B. Joslin, has sued out a writ of error from the United States Supreme Court to the Superior Court of the State of Rhode Island to reverse the judgment and decree of said Superior Court of the State of Rhode Island rendered on the twelfth day of August, A. D. 1921 in the suit of Theresa B. Joslin vs. Walter L. Clarke, City Treasurer, et al.

Now therefore the condition of this obligation is such, that
137 if the above named plaintiff-in-error shall prosecute her said writ of error to effect, and answer all costs and damages that may be adjudged or decreed on account of said error, if she shall fail to make good her plea, then this obligation to be void; otherwise to remain in full force and effect.

THERESA B. JOSLIN. [SEAL.]
NATIONAL SURETY COMPANY,
By S. E. DAVIS, [L. S.]
Attorney in Fact.

Witness:
ALFRED G. CHAFFEE.
Witness:
JOHN A. BENNETT.

Approved this 10th day of November, A. D. 1921.
W. B. TANNER,
Presiding Justice of the Superior Court of the State of Rhode Island.

138 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Superior Court of the State of Rhode Island, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Superior Court of the State of Rhode Island, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Theresa B. Joslin, Complainant, and the City of Providence, a municipal corporation duly created by virtue of and under the laws of the State of Rhode Island, Walter L. Clarke, as City Treasurer of said City of Providence, B. Thomas Potter, Wil-

liam P. Vaughn, William A. Schofield, John Kelso, Joseph H. Gainer, Henry A. Grimwood and Walter F. Slade, constituting the Water Supply Board of said City, Respondents, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws
139 of the United States, and the decision was in favor of their validity; a manifest error hath happened to the great damage of the said Theresa B. Joslin, as by her complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, the tenth day of November, in the year of our Lord one thousand nine hundred and twenty-one.

[Seal of the District Court.]

THOMAS HOPE,
Clerk of the District Court of the United States for the District of Rhode Island.

Allowed by:
WILLARD B. TANNER,
Presiding Justice of the Superior Court of the State of Rhode Island.

140 [Endorsed:] Supreme Court of the United States, October Term, 1921. Theresa B. Joslin vs. Walter L. Clarke, City Treasurer, et al. Writ of Error. Superior Court. Filed Nov. 10, 1921. Walter S. Reynolds, Clerk.

141 STATE OF RHODE ISLAND,
Providence, sc:

Office of the Clerk of the Superior Court.

Equity. No. 5390.

THERESA B. JOSLIN

vs.

WALTER L. CLARKE, City Treasurer, et al.

I, Walter S. Reynolds, Clerk of the Superior Court of said State for the Counties of Providence and Bristol, do hereby certify that there were lodged with me as such clerk on November 10, 1921, in the above entitled cause:

1. The original bond of which a copy is herein set forth.

2. A copy of the writ of error as herein set forth, for filing in my said office and one for each of the respondents.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Superior Court, at Providence, in said County of Providence, on this sixth day of December, A. D. 1921.

[Seal of the Superior Court of the State of Rhode Island.]

WALTER S. REYNOLDS,
Clerk.

142 UNITED STATES OF AMERICA, *ss:*

To City of Providence, Walter L. Clarke, as he is city treasurer of said city of Providence; B. Thomas Potter, William P. Vaughn, William A. Schofield, John Kelso, Joseph H. Gainer, Henry A. Grimwood, and Walter F. Slade, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Superior Court of the State of Rhode Island wherein Theresa B. Joslin plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Willard B. Tanner, Presiding Justice of the Superior Court of the State of Rhode Island, this 10th day of November, in the year of our Lord one thousand nine hundred and twenty-one.

WILLARD B. TANNER,
Presiding Justice of the Superior Court of the State of Rhode Island.

143 Providence, R. I., November 12, 1921.

Due and legal service of the foregoing citation is hereby acknowledged.

ALBERT A. BAKER,
ELMER S. CHACE,
Attorneys for the Defendants in Error.

Copy of Above Acknowledgment of Service.

Providence, R. I., November 12, 1921.

Due and legal service of the foregoing citation is hereby acknowledged.

ALBERT A. BAKER,
ELMER S. CHACE,
Attorneys for the Defendants in Error.

144 Superior Court of the State of Rhode Island, &c., for the Counties of Providence and Bristol.

Eq. No. 5390.

THERESA B. JOSLIN (Plaintiff in Error)

vs.

WALTER L. CLARKE, City Treasurer, et al. (Defendants in Error).

Præcipe.

To the Clerk:

You are hereby requested to make a transcript of record to be filed pursuant to writ of error allowed in the above entitled cause, and to include in such transcript of record the following:

(1) Bill of Complaint and Exhibits annexed thereto.

(2) Subpœnas.

(3) Appearance for Defendants.

(4) Defendants' Answer.

(5) Document calling attention of the Superior Court to constitutional questions.

(6) Order certifying constitutional questions to the Supreme Court.

(7) Opinion of the Supreme Court.

(8) Decree of Superior Court dismissing bill of complaint.

(9) Petition for writ of error.

(10) Assignments of error.

145 (11) Bond.

(12) Order allowing writ of error and approving bond.

(13) Citation and acknowledgment of service.

(14) Writ of Error.

Respectfully,

ROBERT H. McCARTER,
JAMES HARRIS,
FRANCIS I. McCANNA,
ALFRED G. CHAFFEE,
Attorneys for Plaintiff in Error.

Assented to:
ALBERT A. BAKER,
ELMER S. CHACE,
Attorneys for Defendants in Error.

146 [Endorsed:] Eq. No. 5390. Theresa B. Joslin (Plaintiff in Error, vs. Walter L. Clarke, City Treasurer, et al. (Defendants in Error). Præcipe. Superior Court. Filed Nov. 18, 1921. Walter S. Reynolds, Clerk. Alfred G. Chaffee, Attorney at Law.

147 UNITED STATES OF AMERICA,
State of Rhode Island,
Providence, sc:

Superior Court.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record of the proceedings of the within entitled case, Theresa B. Joslin vs. Walter L. Clarke, City Treasurer, et al., together with all things concerning the same.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Superior Court of the State of Rhode Island, at Providence in said County of Providence, on this sixth day of December, A. D. 1921.

[Seal of Superior Court of the State of Rhode Island and Providence Plantations, Providence County.]

WALTER S. REYNOLDS,
Clerk of Superior Court.

Cost of transcript, $94.35, paid by the Plaintiff in error.

Endorsed on cover: File No. 28,597. Rhode Island Superior Court. Term No. 642. Theresa B. Joslin, plaintiff in error, vs. City of Providence, Walter L. Clarke, as city treasurer; B. Thomas Potter, et al.. &c. Filed December 9th, 1921. File No. 28,597.

INDEX.

PAGE.

Plaintiffs in Error 1

Defendants in Error 2

Statement 3

An Act to furnish the City of Providence with a supply of pure water—Chapter 1278, Public Laws, 1915 11

Travel of Case 42

Argument 43

1. That under said act, the taxpayers of the City of Providence are to be burdened by a large and unnecessary expenditure and by an expenditure which is not wholly for the benefit of the City of Providence but in part for the benefit of other municipalities, corporations or companies outside of the City of Providence which do not contribute to any portion of the expenditure for said water supply or if they do, such contribution is not by said act required to be just compensation to the City of Providence 43

II and III. Said act denies to persons within the jurisdiction of the State of Rhode Island the equal protection of the laws and deprives them of their property without just compensation 61

A. Because it fixes the compensation, or determines in what it shall consist or prescribes the rules and principles upon which it shall be computed 61

PAGE.

B. And because such a determination of what is just compensation is not a legislative, but a judicial function 64

C. Because said act is unjustly discriminatory as between persons and property owners of the same class. 72

D. Because the compensation required to be paid by the City of Providence, in excess of the just compensation guaranteed by the Constitution of the United States is arbitrary, confiscatory and should be condemned as depriving said Complainants of their property without due process of law..... 77

IV. Said act is unconstitutional and void, in that it permits the City of Providence to take possession and use of Complainants' property, and to rent, sell and dispose of the same without offering any compensation therefor permanently or tentatively determined..... 82

A. It is the constitutional right of the landowner that there shall be a prior determination by an impartial appraisal of the value of his land before the same may be taken under eminent domain, and that this determination of value shall be the amount which the landowner may expect to receive or have adequately secured to him before any taking can become effectual. The landowner should not be required to

PAGE.

initiate the proceedings to bring about such appraisal..... 85

V. Under said act the Complainant and other owners are deprived of their property without due process of law, without remedy by recourse to the laws, conformably to the laws, or by the law of the land, in that their property is allowed to be taken under color of eminent domain by the City of Providence acting under said act, when the questions of the necessity of the taking as a whole or of the taking of the various parcels which are taken have not been decided by the Legislature itself, but have been relegated to the City of Providence to decide *ex parte*, without appeal and without an opportunity to have said questions heard and decided by any impartial tribunal..... 99

A. The fundamental principles which have hitherto been found necessary to give complete and satisfactory protection to the land owner when his property is to be taken from him by some exercise of the sovereign power are an inseparable part of the body of our Constitution and established laws. They are vital to his rights,—they are his rights 101

B. While the power of eminent domain is an attribute of sovereignty, its exercise can only be constitutionally justified when the use is

PAGE.

a public one and the taking is necessary for the reasonable exercise of the use..... 103

C. The attempt of the legislature to make the city council the sole judge of the necessity for the taking of certain property and the extent of such taking without right of the landowner to be heard to say that the public use may be fully subserved without taking his property or some part thereof, contravenes Article XIV of Amendments to the Constitution of the United States..... 106

(a) The legislature has not determined the necessity for taking specific property... 107

(b) The attempt to vest in the city council the right to make final decision as to the necessity for taking private property and the extent of the taking, upon its ex parte judgment, is not due process of law.... 109

Conclusion 129

TABLE OF CASES AND AUTHORITIES CITED IN THE BRIEF.

PAGE.

Ahern vs. Newton, &c., Ry. Co., 105 Fed. 703.. 71
Albany Street, Matter of, 11Wend. (N. Y.) 149.106
Askam vs. King County, 9 Wash. 1..... 89
Auditor General vs. McArthur, 87 Mich. 457.. 51
Same vs. Improvement Co., 129 Mich. 182.... 51
Backus vs. Fort Street Union Depot Co., 189 U. S. 557..... 87
Baldwin, Prosecutor, vs. Fuller, 39 N. J. L. 576 53
Baltimore & Ohio R. R. Co. vs. The P. W. & Ky. R. R. Co., 17 W. Va. 812..... 118
Barbier vs. Conolly, 113 U. S. 27..... 76
Belpoint, Town of, vs. Pence, 17 S. W. 197 (Ky.) 51
Bennett vs. City of Marion, 106 Iowa 628.... 119
Boyd vs. Ritter & Co., 119 Pa. 348..... 60
Caldwell vs. Highway Commrs., 249 Ill. 366..97-98
Charles River Bridge Props vs. Warren Bridge Props., 11 Pet. 420..... 66
Chicago, Burl. & Quincy R. R. Co. vs. Chicago, 166 U. S. 226.....85-103
Com. vs. Pittsburgh & C. R. Co., 58 Pa. St. 26.. 66
Cooper vs. Board of Works, 108 Com. Law 180. 119
Elyria Gas & Water Co. vs. Elyria, 57 Ohio St. 374; 49 N. E. 325..... 61
Errington vs. Metropolitan Dist. R. Co., 51 L. J. Ch. N. S. 305; L. R. 19, Ch. Div. 559... 122
Fairbanks vs. United States, 181 U. S. 300.... 59
Fallbrook I. District vs. Bradley, 164 U. S. 112. 125
Grafton vs. Railway, 16 N. Dak. 313..... 121
Greene vs. Commission, 19 Ohio State 252.... 61

PAGE.

Hairston vs. D. & W. Railway Company, 280 U. S. 598 125
Isom vs. Miss. Cent. R. Co., 36 Miss. 300 66
Jeter vs. Vinton, etc., 114 Va. 769 60
Johnson vs. Peterson, 85 Neb. 83 60
Jones vs. City of Portland, 245 U. S. 221 80
Kane vs. Mayor, re., of Baltimore, 15 Md. 240 104-128
Kennedy vs. Indianapolis, 103 U. S. 599 87
Kilbourn vs. Thompson, 103 U. S. 168 68
Kincaid vs. Seattle, 74 Wash. 617 90
Kohl vs. United States, 91 U. S. 367 124
Kountze vs. Morris Aqueduct, 58 N. J. L. 303. 121
Leeper vs. Texas, 139 U. S. 462 77
Levee Commrs. vs. Dancy, 65 Miss. 335 88
Lewis vs. City of Lincoln, 55 Neb. 1 .....
Lynch vs. Forbes, 161 Mass. 302 122
Lynch vs. Sewer Commrs., 55 L. J. Ch. N. S. 409; L. R. 32, Ch. Div. 72 122
Madary vs. City of Fresno, 128 Pac. 340; 20 Cal. App. 91 80
Marshall, ex parte, 74 Ala. 266 51
Mayo vs. Dover & Foxcraft Village Fire Co., 96 Me. 539; 53 Atl. 62 56
Merchant vs. Penn. R. R. Co., 153 U. S. 380.. 76
Meyers vs. Adams, 63 A. D. 540; affirmed 169 N. Y. 605 72
Miller vs. Town of Pulaski, 63 S. E. 881 (Va.). 60
Monongahela Navigation Co. vs. United States, 148 U. S. 312 ..... 59, 64, 70
National City Bank vs. United States, 275 Fed. 855 72
Newburyport Water Co. vs. Newburyport, 103 Fed. 584 ..... 59, 69
Norton vs. Peck, 3 Wis. 714 91
Olmstead vs. Proprietors of Morris Aqueduct, 36 N. J. L. 495 120

PAGE.
Passaic Valley Sewerage Com. vs. Jersey City, 92 N. J. L. 265 54
Peirce vs. Bangor, 105 Me. 413; 74 Atl. 1039.. 72
Penn. R. R. Co. vs. Balt. & Ohio R. R. Co., 60 Md. 263 66
People vs. Sisson, 77 N. Y. Supp. 376; affirmed 173 N. Y. 606..... 54
Peterson vs. Smith, 6 Wash. 163..... 90
Powers vs. Bears, 12 Wis. 213..... 90
Railroad Company vs. Blake, 9 Rich. (So. Car.) 228 117
Railway Steel Spring Co. vs. Chicago, 26 Fed. 690 72
Reagan vs. Farmers Loan & Trust Co., 154 U. S. 362.....59, 67, 71, 79
Reed, &c., vs. Louisville Bridge Co., 8 Bush. (Ky.) 69 116
Savings & Loan Assn. vs. Topeka, 20 Wall. 655. 80
Sears vs. Akron, 246 U. S. 242..... 125
Shepardson vs. Mil. & Beloit R. R. Co., 6 Wis. 605 91
Shoemaker vs. United States, 147 U. S. 282... 125
Smith vs. Ames, 169 U. S. 526..... 71
Snohomish County vs. Hayward, 11 Wash. 429 90
Spring Valley Water Works vs. San Mateo Water Works, 64 Col. 123..... 121
State, ex rel. Consolidated Stone Co. vs. Houser, 125 Wis. 256; 104 N. W. 77..... 80
State, Baldwin, Prosecutor, vs. Fuller, 39 N. J. L. 576..... 52
Stearns vs. The City of Barre, 73 Vt. 281; 50 Atl. 1086.....111-122
Taber vs. N. Y., Prov. & Boston R. R. Co., 21 R. I. 269..... 78
Talbot vs. Hudson, 16 Gray 417..... 96
Tedens, et al., vs. Sanitary District, 149 Ill. 87. 116

PAGE

Tracy vs. Elizabethtown, re. R. R. Co., 80 Ky. 259 116
Tuthill, Matter of, 163 N. Y. 133..... 104
Union Bridge Co. vs. United States, 204 U. S. 397 59
United States vs. Armstrong, 265 Fed. 683.... 77
United States vs. Rogers, 255 U. S. 169.....59, 71
United States vs. Yount et al., 276 Fed. 861... 77
Van Cleve vs. Passaic, 71 N. J. L. 574..... 53
Water Commissioners vs. Manchester, 87 Conn. 193 104
Weimer vs. Banbury, 30 Mich. 201..... 102
Western Union Tel. Co. vs. Myatt, 98 Fed. 335 72
Wisconsin Tel. Co. vs. R. R. Comm., 162 Wis. 383 91

Supreme Court of the United States.

OCTOBER TERM, 1922.

JOSLIN MANUFACTURING COMPANY,
vs.
WALTER L. CLARKE, City Treasurer, et al. } No. 219

SCITUATE LIGHT & POWER COMPANY,
vs.
WALTER L. CLARKE, City Treasurer, et al. } No. 220

THERESA B. JOSLIN,
vs.
WALTER L. CLARKE, City Treasurer, et al. } No. 221

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF RHODE ISLAND.

BRIEF FOR PLAINTIFFS IN ERROR IN SUPPORT OF THEIR PETITION FOR WRITS OF ERROR.

THE PARTIES

PLAINTIFFS IN ERROR.

The plaintiff in error, Joslin Manufacturing Company, is a manufacturing corporation created under an act of the General Assembly of said State of Rhode Island and carrying on business in said State in the City of Providence and in the Town

of Scituate in the County of Providence; it is the owner of and engaged in operating mills at Merino and Dyerville in said City of Providence, one mill at Richmond, two at Rockland, two at Clayville and one at Ponaganset, all in said Town of Scituate, in which group or chain of mills it is engaged in making cotton yarn, cotton lacing, and boot, shoe and corset lacings. (Record, page 2.)

The plaintiff in error, Scituate Light & Power Company, is a corporation created under an act of the General Assembly of said State of Rhode Island and carrying on the business of furnishing light, heat and motive power by electricity and otherwise in said State in the Town of Scituate and adjoining towns in the County of Providence; it controls and operates, by ownership, lease and otherwise, certain water powers and water privileges within said Town of Scituate, used and utilized for the purpose of generating electricity for the purposes aforesaid, which it distributes over large portions of said town to the users and purchasers thereof. (Record, page 2.)

The plaintiff in error, Theresa B. Joslin, is a resident of the Town of Scituate and the owner of real estate in said Town of Scituate and the City of Providence, and a taxpayer in said town and city. (Record, page 2.)

DEFENDANTS IN ERROR.

The defendants in error are Walter L. Clarke, as he is City Treasurer of the City of Providence, and the members of the Water Supply Board of said city, created by an act of the General Assembly of the State of Rhode Island entitled "An Act to Furnish the City of Providence with a Supply of Pure

Water," approved April 21, 1915, and denominated as Chapter 1278 of the Public Laws of 1915. (Record, page 2.)

STATEMENT.

At a session of the General Assembly of the State of Rhode Island for the year 1915 was enacted an act entitled "An Act to Furnish the City of Providence with a Supply of Pure Water". Said act is also known as Chapter 1278 of the Public Laws of 1915 of said State of Rhode Island. (Record, page 3.)

By said act a board of commissioners, known as the Water Supply Board of the City of Providence, was established, consisting of seven persons, the same being the said individuals hereinabove mentioned as defendants in error and as constituting the Water Supply Board of said City. (Record, page 3.)

On January 29, 1917, defendants in error gave plaintiffs in error notice of the taking of certain of their lands, estates, water rights and property under and by virtue of the provisions of said Chapter 1278 of the Public Laws of 1915. (Record, page 19.)

Pursuant to the provisions of the act, said water board prepared a description of the lands, etc., proposed to be taken, and a plat thereof together with a list purporting to be a list of the owners and persons interested in such lands so far as known to said water supply board, and submitted the same to the city council of the city of Providence for action upon the proposal. The city council by resolution, No. 397, approved December 4, 1916, did elect to take and alleged that it took the certain lands, etc., therein described, and wherein were specified the nature and extent of the

title and the purpose or purposes for which the same were taken, and thereupon provided for filing in the office of the town or city clerk in each of the following towns and city: namely, in the Towns of Scituate, Foster, Johnson, Coventry, West Warwick, Warwick and the City of Cranston, a statement containing a description of the lands, etc., and the nature or extent of the title herein taken, and stating that the same were taken pursuant to the provisions of said act and stating the purpose or purposes for which the same were taken thereunder (such statement being a recital of all the purposes for which lands, waters or water rights might be taken under the provisions of said act, but not designating any special purpose or purposes as the occasion of the taking of any specific parcel or parcels thereof), and also a plat of said lands, the same being a duplicate of the plat accompanying said resolution with the addition of the number and date of the passage of said resolution and the signature of the Mayor thereon; and thereupon, in conformity with said resolution, such statement, with accompanying plat, was filed on December 6, 1916, in each of the offices above named. A copy of such statement affecting the properties of each of the above plaintiffs in error is annexed to each of their bills of complaint and marked "Exhibit A".

(Record, Case No. 219, p. 39)
(" " " 220, p. 38)
(" " " 221, p. 24)

The said taking, with certain exceptions, not here material, was in fee simple.

On January 29, 1917, notice of such taking was given by said City to the plaintiffs in error, and on March 7, 1917, said City, on request, delivered to said plaintiffs in error, through their attorneys, descriptions of the lands, etc., of plaintiffs in error included within the condemned area, the defendants in error disclaiming that the said descriptions were complete or perfect descriptions of the properties taken. A copy of same is annexed to plaintiffs in error said bills of complaint and marked "Exhibit B" in each case.

Record, Case No. 219, page 25.
" " " 220 " 26.
" " " 221 " 22.

The plaintiff in error, Joslin Manufacturing Company, is the owner of numerous large and valuable holdings within the area purported to be condemned by the city of Providence, as aforesaid, and which said city purports to have taken by said condemnation as aforesaid, comprising more than thirty distinct tracts with numerous and valuable buildings and improvements thereon, including four mill villages, namely, the villages of Richmond, Rockland, Clayville and Ponaganset, and six mills fully equipped with valuable and extensive fixtures and fixed machinery in which group or chain of mills it is engaged in making cotton yarn, cotton lacing, and boot, shoe and corset lacings, of which it is the largest manufacturer in the world, and that in said Scituate it is engaged in other branches of business incidental to or connected with the particular business of manufacturing shoe and corset lacings as aforesaid. Each of

said mills carries on its own part or parts of said work, which is divided between them so that no mill does the whole line of work, but each is dependent upon the carrying on of portions of the work at the other mills. (Record, page 2.)

By the resolution of the City Council hereinbefore referred to, No. 397, approved December 4, 1916, the city of Providence alleged that it took in fee simple according to an inclusive description and plan a certain large area which includes the above described property of the said plaintiff in error and the waters, water rights and privileges connected therewith, all of the same being included within the area enclosed by the boundary line colored red on the plat filed in the office of the Secretary of State by said city pursuant to the provisions of the Act. (Record, page 16.)

In connection with part of said land of the said plaintiff in error purported to have been condemned by said city are rights to the underlying fee in certain highways, and the rights to use existing highways which said city purports to terminate by virtue of such taking. Other parts of the property of said plaintiff in error are taken in connection with the relocation and building of new roads or highways. (Record, page 17.)

Said plaintiff in error is the owner of a large amount of valuable machinery now in said mills which has not been removed from said mills or surrendered to said city under said Act. (Record, page 2.)

The said plaintiff in error avers that the city has commenced work upon the construction of a dam in the village of Kent in accordance with its

announced plans, which under the provisions of the Act it is constructing by contract, and that on account of the magnitude of the work said city is not likely to complete said dam under four or five years, with the probability that the period of construction will be for a much longer period, and furthermore that the city in all probability will not be able to take water for water supply purposes from the reservoir made by said dam under about ten years from the present date. (Record, page 20.)

The said plaintiff in error further avers that for the purposes mentioned in the Act the city has no need for taking possession of its property until the dam is nearly or quite completed, and that the damage to said property from the city's taking possession of the said property either at the present time or at any time in the immediate future would greatly outweigh any benefit the city could obtain from the same by leasing or using the same or otherwise. (Record, page 21.)

The said plaintiff in error further avers that the city could obtain from said north branch of the Pawtuxet river an abundant supply of pure water for its purpose far more readily and with a smaller outlay, without disturbing any portion of the property of plaintiff in error and that even with the reservoir and dam constructed under the present plan none of the mills of plaintiff in error is flooded out with the exception of one mill at Richmond, and that the taking of all the other mills of the plaintiff in error and mill villages is unnecessary. (Record, page 2.)

Plaintiff in error further avers that it does not desire to dispose of any of its mills and that the loss

of said mills in said Scituate is a great hardship to it and the damages are practically impossible to measure and irreparable if it is required to abandon said mills purported to be taken under the act and that if the same are taken in the immediate future the business of the said plaintiff in error will be disorganized so as to quite ruin the same; that each mill is so dependent upon the other that but a small part of its business could be done elsewhere. Said plaintiff in error also avers that it is a taxpayer in the city of Providence. (Record, page 23.)

The defendants in error aver that the work of constructing the entire main dam will probably require four years, and that the city will be able to take water for water supply purposes from said reservoir about one year later than the completion of said main dam. The defendants in error deny that the city has no need for taking possession of the properties of plaintiff in error until said dam is nearly or quite completed, and aver on information and belief that the said plaintiff in error at the time of the purported taking was the owner of various extensive tracts of land, which in part are included within the location of said reservoir as planned and in part within the locations of the various new highways and relocated highways which are required by and under said act to be laid out and constructed, and that the same will be required to be used in the construction of said reservoir and the improvement of the lands therein therefor and the construction of said relocated highways long before the dam shall be completed. (Record, page 88.)

The plaintiff in error, Scituate Light & Power Company, is the owner of numerous large and valuable holdings within the area purported to be condemned by the City of Providence as aforesaid, and which the said City purports to have taken by said condemnation as aforesaid, comprising more than sixteen distinct tracts with numerous and valuable buildings and improvements thereon, including leasehold rights in power plants and the appurtenances thereof located at the villages of Richmond, Rockland, Clayville and Ponaganset, as well as mills and mill estates or locations, together with water power and rights connected with the same. (Record, page 2.)

It avers that the constant operation of its electric plants and generators has become and is of public necessity to said Town of Scituate and to the industries thereof. (Record, page 2.)

It also alleges the purported taking by the city of its land and other property with the rights connected therewith, its rights in existing highways and the taking of land for the purpose of new highways, similarly to the allegations made by said plaintiff in error, the Joslin Manufacturing Company, that such taking is not presently necessary, and that the need for such property will be long deferred; and that the plaintiff in error does not desire to dispose of its said property, and makes other allegations similar in substance to those of the Joslin Manufacturing Company. (Record, page 22.)

It alleges that if its estate is so taken from it, the loss of power plants, mills, mill privileges with the water power and improvements connected therewith owned by the plaintiff in error will be a great hardship to it and cause an irreparable damage,

will ruin its business and bring it to an end. (Record, page 24.)

It alleges that it supplies a large part of the manufacturing industries of the Town of Scituate with light and power, and that if its property is so taken the business of the Joslin Manufacturing Company will be stopped for failure to get electric energy to conduct its business and a large number of residents of Scituate will be deprived of electricity now furnished for domestic and other uses. The said plaintiff in error refers to the loss, damage and deprivation to be suffered by others than it by the enforced closing down of its business because plaintiff in error is chartered to perform public service, which public service it has for some years past been rendering, and planning and attempting to establish, enlarge and perfect. (Record, page 24.)

It also alleges that for a considerable number of years past it has planned and has executed plans for the scientific and economic generation of electricity through the utilization of the existing water powers in the Town of Scituate and the existence and improvement of such water powers to the end that the maximum benefit might thereby be obtained, both for the purchasers of such electricity or electric energy, including the public as well as for the benefit of the plaintiff in error. (Record, page 24.)

The said plaintiff in error has acquired, in addition to the water power held by it under lease or ownership, the right of the Joslin Manufacturing Company to maintain poles and wires in and on the highways of the Town of Scituate as well as over the lands of individuals and private owners.

The averments in the answer of the respondents to the Bill of said plaintiff in error are substantially the same as their averments as above set forth, in connection with the averments of the said Joslin Manufacturing Company as above set forth. (Record, page 87.)

The property of the plaintiff in error, Theresa B. Joslin, purported to have been taken under color of said Act is her home in the Village of Richmond near the Richmond Mill, occupied by the said plaintiff in error and by her son, William H. Joslin, who is the active manager of both the Joslin Manufacturing Company and the Scituate Light & Power Company, of both of which corporations he is President. The said plaintiff in error, Theresa B. Joslin, is the majority stockholder in both said corporations, and she is also a taxpayer in the city of Providence. (Record, pages 2 and 19.)

The respondents' answer is in all material respects identical with their answer to the bills of complaint in the other two cases above. (Record, page 73.)

THE ACT.

Those portions of said Act which are pertinent to the questions at issue are as follows:

(Record Case 219, pages 3-15; Case 220, pages 3-15; Case 221, pages 3-15.)

CHAPTER 1278.

AN ACT TO FURNISH THE CITY OF PROVIDENCE WITH A SUPPLY OF PURE WATER.

Approved April 21, 1915.

SECTION 1. A board of Commissioners, to be known as the water supply board of the city of Providence, is hereby established in and for the city of Providence, consisting of the seven

persons who are now the members of the committee relative to increased water supply in the city, appointed by the city council of said city under resolution number 19, approved January 7, 1913, and resolution number 423, approved December 6, 1913, and Chapter 69 of the ordinances, approved December 9, 1914. Such persons shall hold their respective offices as members of said board until the duties of said board hereunder are completed, and such of said persons as are *ex officio* members of said committee shall not cease to be members of said board by reason of their ceasing to hold their other respective offices. * * *

(The remainder of the section concerns the filling of vacancies, the control of the city council over the board, removal of members, etc.)

SEC. 3. Said board, as soon as may be, shall investigate and determine as to whether a part of the north branch of the Pawtuxet river, and the water shed tributary thereto, would be the most available and desirable source for a supply of pure and wholesome water for the city of Providence and for any territories now supplied, or hereafter supplied under the provisions of this act, by means of the waterworks of said city, and if that source is approved, said board shall proceed to make a plan, locating a storage reservoir or reservoirs on and adjoining said branch of said river, including any tributaries of said branch, and an aqueduct to carry water from such reservoir or reservoirs to the waterworks of said city at Sockannosset, and said board at any time may change or modify such plan or any amended plan.

SEC. 4. After making such a plan, said board from time to time may acquire by pur-

chase for and in the name of said city, and said city may hold and use, such lands and such estates, easements, rights and interests therein, and such waters and water flowage rights and privileges and rights to hold and take water, as are necessary or desirable for such water supply and such reservoir or reservoirs and such aqueduct, and any dams, sluices, culverts, water and land ways and works connected therewith or incidental thereto, and for executing the work of all kinds, including removing and disposing of surplus earth and other materials, and for protecting and preserving the waters in such reservoir or reservoirs and the waters of said river branch and its tributaries flowing thereto, from pollution, and from the deposit therein of any matters which would reduce the quality or value of any such waters as a potable water supply, and for filtration and other works for treating such water supply, and for carrying out the purposes, directions and requirements of this act: *Provided, however,* that said board shall not make any contract for any such purchase until the city council of said city shall have first made due provision for supplying the necessary funds

SEC. 5. Said city of Providence is hereby authorized from time to time and in the manner hereinafter provided to acquire by condemnation any lands, improved or unimproved, and any estate, easements, rights and interests in any lands, which are included within the area enclosed by the boundary line colored red on the accompanying plat marked "Plat of lands enclosed by red lines hereon, mostly in the town of Scituate, which may be taken by the city of Providence for water supply purposes, Samuel M. Gray, civil engineer, 1915,"

a plat of part of said line at North Scituate being also shown on the accompanying supplementary plat, entitled "Map showing location of condemnation line at and near North Scituate, Samuel M. Gray, civil engineer, 1915," and which the city council of said city deems necessary for the location, construction, maintenance and operation of a reservoir or reservoirs and any dams, sluices, culverts, water and land ways, and works connected therewith or incidental thereto, and also any lands and any estates, easements, rights and interests in any lands within said area which said city council deems necessary for protecting and preserving the waters in such reservoir or reservoirs and the waters of said river branch and its tributaries flowing thereto from pollution and from the deposit therein of any matters which would reduce the quality or value of any of such waters as a potable water supply, and for filtration and other works for treating such water supply, and for carrying out the purposes, directions and requirements of this act, *and also any lands, and any estates, easements, rights and interests in any lands, which said city council deems necessary* for the location, construction, maintenance and operation of an aqueduct in a strip of land from such reservoir or the lower of any such reservoirs to said water works at Sockanosset, not to exceed two hundred feet in width, and for ways to such strip of land from the nearest public highways, and for executing the work at, adjoining or near the portals and shafts of any tunnel construction designed as part or parts of such aqueduct, including removing and disposing of surplus earth and other materials. Said city may take any such lands in fee simple or any

estate, easement, right or interest in any such lands absolutely, except as hereinafter provided.

Upon the passage of this act, said plats shall be kept on file in the office of the secretary of state. Said boundary line enclosing said area is described as follows:

(Here follow over seven printed pages of detailed description, purporting to give the courses of the red lines shown on said plat.)

SEC. 6. Said city of Providence is hereby authorized from time to time and in the manner hereinafter provided to acquire absolutely by condemnation, the waters of said branch of said river and its tributaries, or any part or parts thereof, included within said area shown within red lines on said plat, *and any water or flowage rights or privileges appurtenant to or connected with said area or any part or parts thereof, and any waters flowing into such reservoir or reservoirs,* and to there hold such waters and to appropriate and divert the same for such water supply; *Provided, however,* that said city shall not hold or divert any such waters until such a reservoir or reservoirs is or are ready for use. * * *

(In this section further provision is made for the flow of water below such reservoirs.)

SEC. 7. In case a part only of any farm or of any lot or tract of land is taken under any of the provisions of this act, which part is included within said area shown within red lines on said plat, and the remainder or any portion

thereof, whether or not situated within said area is damaged or lessened in value by such taking, the owner or owners thereof may surrender to said city the portion so damaged or lessened in value, by giving to said board or the city council of said city written notice of such surrender, describing the land surrendered, within one year after said taking; whereupon, the portion so surrendered shall be deemed to be included in such taking and shall vest in said city in fee simple and said city shall be liable to pay, and such owner or owners may recover from it, just compensation for the same in any proceedings brought by them for the recovery of damages for land taken under this act.

In case any land included in said area has a mill thereon which mill is taken under any of the provisions of this act, the owner or owners thereof may surrender to said city any or all their reservoirs, dams, sluices, culverts, waterways and works connected therewith or incidental thereto, and any or all their water rights or flowage rights used or acquired for use in connection therewith, whether the same are or are not situated within said area, by giving to said board or the city council of said city written notice of such surrender, describ- what is so surrendered, within one year after such taking; whereupon such surrendered real estate and improvements thereon, and water rights and flowage rights shall be deemed to be included in such taking and shall vest in said city in fee simple or absolutely, and said city shall be liable to pay, and such owner or owners may recover from it, just compensation for the same in any proceedings brought by

them for the recovery of damages for land taken under this act. * * *

(In the remainder of this section provision is made for the surrender to the City of the Ponaganset Reservoir, located in the Town of Glocester, and which is outside the area of the said red lines.)

SEC. 8. Within any lands included in said area, which are acquired or taken by said city hereunder, or are owned and held by said city, for the purpose of such reservoir or reservoirs and water supply, or for the protection thereof, upon such acquisition or taking or ownership of the same, any and all public highway rights or easements in any part or parts of such lands shall terminate, and thereafter said city may close any and all public highways therein, or if said city shall leave upon any such highway or highways or permit the same to be traveled, they nevertheless shall remain the private ways of said city, and any persons or the public using the same shall not thereby acquire any right of way or public easement of travel therein, except as hereinafter provided. * * *

(This section further provides for certain named highways and the laying out of highways and changing of grade of highways by said City) and then goes on as follows:

Said city may acquire by purchase or condemnation in the manner herein provided any lands or easements therein, which the city council of said city deems necessary to lay out and build such new roads or highways or to relocate any parts of any such existing highways, or for lateral support or slopes of any of the

same and of such highways regraded or raised, or required to furnish any new route or location for any portion or portions of the railroad of the Providence & Danielson Railway Company herein provided for.

* * * * * * *

SEC. 11. In case any land included in said area shown within red lines on said plat or elsewhere in said town of Scituate is taken for said water supply or other purposes, which is owned or used by such town or any district for any public purpose or purposes, the town council or any committee appointed by the financial town meeting of such town for such town and the trustees or other duly authorized representatives of such district for the district may agree with said city upon the amount of damages suffered by it by reason of such taking, or if said city desires to acquire by purchase any such land they may agree with said city upon the fair cash value of the same, including all improvements thereon, and may cause the same to be duly conveyed to said city upon its paying such price therefor. In case of such taking, such town or district may surrender to said city any furniture and building equipments contained in any building or buildings on any such land by giving to said board or other authorized representative or representatives of said city, or the city council thereof, within six months after such taking written notice of its surrender of the same to said city, whereupon the said city shall be liable to pay for such of said articles as are surrendered and actually delivered to the said city the fair value of the same at the time of such delivery as part of the damages for such taking. In connection with

any purchase of any such land, said city may purchase any such furniture and equipments as such town or district acting by its said representatives may offer to sell to it, and at such fair price as may be agreed upon by said city and such town or district acting by its said representatives. Said board or other authorized representative or representatives of said city shall represent said city with power to make for the city any such purchases and agreements.

SEC. 12. In case any land included in said area shown within red lines on said plat or elsewhere in said town of Scituate has a mill thereon, which is taken hereunder, the owner or owners of such mill may surrender to said city of Providence the machinery in use or set up in such mill at the time of such taking by giving to said board or other authorized representative or representatives of said city, or the city council thereof, within six months after such taking written notice of its surrender of the same to said city, whereupon said city shall be liable to pay for the machinery as surrendered and actually delivered to said city the fair value of the same at the time of such delivery, as part of the damages for such taking. In connection with any purchase of any such mill property, said city may purchase any such machinery in use or set up therein as such owner or owners may offer to sell to it, and at such fair price as may be agreed upon by said city and such owner or owners. Said board or other authorized representative or representatives of said city shall represent said city with power to make any such purchases and agreements.

In case the owner of any mill taken by said

city under the provisions of this act shall not surrender such machinery, he shall be allowed a reasonable time in which to remove the same; and, in case the city and said owner are not able to agree on what is a reasonable time for such removal, the time therefor shall, on petition in equity by said owner or said city, be determined by the superior court for Providence county, taking into consideration all the circumstances of the case and the needs of both parties, with the right to make such orders and decrees in relation to the time and manner of carrying on the work of removal or the work of the city interfering therewith as justice shall require; and, in case the necessities of said work of said city require such machinery to be removed at a time or in a manner not otherwise reasonable therefor, said court may make such allowance as it shall deem equitable to compensate said owner for the special damages, if any, suffered by him by reason of the removal of said machinery at the time and in the manner so required by the necessities of such work of said city, over and above what would have been occasioned by its removal at a time and in a manner which would have been otherwise reasonable, but for such special need of said work of said city.

In case said owner does not surrender such machinery to said city, said city shall pay to him, as a part of his damages for the taking of said mill, the reasonable expense and cost of removing such machinery, from its old location at said mill to a new location within the New England states, of setting up such machinery in the place therein in which it is to be used by said owner. The amount of such reasonable cost and expense, if not agreed upon

by the parties, shall be determined in the same manner as is provided herein for the determination of damages for the taking of lands, or interests, or rights therein.

SEC. 14. Relative to locating said aqueduct and taking any lands therefor outside of said area shown within red lines on said plat, said city shall not acquire by condemnation any portion of the location or right of way of any railroad or street railway company or any public highway, except for the purpose of locating and carrying said aqueduct across such location, right of way or highway below grade, and during the time of the construction of said aqueduct across the same the work shall be done so as not to impair the use of the same more than may be reasonably necessary.

Said city of Providence, relative to its work from time to time of constructing, repairing, renewing, maintaining and operating said aqueduct across any such location, right of way or highway, shall prosecute or cause to be prosecuted with due care all such work, and shall indemnify and save harmless each other town and city and every railroad and street railway company from any and all damages suffered by it, or for which it may be liable on aaccount of any injuries to any persons or property, caused by any negligence in the plan or method of doing such work, or caused by any defect or want of repair in any such location, right of way or highway due to any negligence in the digging up or restoring of the same or in leaving such work while in process or at completion. In case any pipes, conduits, poles, wires or other property of any kind, lawfully situated in any public highway are damaged or

impaired by any work of said city of Providence hereunder, said city shall be liable for such damage or impairment, and shall pay all expenses of restoring, repairing, relocating or remedying the same. Said city shall pay for the cost of such additional police protection as may be necessary in any town or city in consequence of the carrying on of any work of building such reservoir or reservoirs or aqueduct or any road work hereunder, and during the time of the progress of such work therein, and said board or other authorized representatives of said city may for said city agree with such other town or city upon the amount of such additional cost, if any.

Any sums of money due from city to any other town or city, any railroad or street railway company or any other corporation, person or persons on account of any express liabilities of said city under this act, which are not included in or provided to be recovered as damages for any taking hereunder shall be recoverable, if not paid when due, in an action of the case against said city brought in the superior court within and for the county of Providence.

SEC. 15. The owner or owners of any land, not taken under the provisions of this act, but contiguous to any land in said area shown within red lines, on said plat acquired or taken by said city hereunder, which is directly or indirectly decreased in value by reason of such acquisition or taken by said city, shall have the right to claim and recover damages for such decrease in value; and said board may agree with such owner or owners as to the amount of such damages and thereupon said city shall pay the same to such owner or owners forthwith, and,

in default of such agreement, such damages shall be determined and be collectible in the same manner as is hereinafter provided for determining and collecting the damages for land taken hereunder: PROVIDED, such owner or owners shall file in said superior court for Providence county his or their petition or application for an assessment of such damages within three years after the date of the passage of this act.

SEC. 16. The owner or owners of any business located on land situated in said town of Scituate or on said north branch of the Pawtuxet river and established prior to the passage of this act, which is directly or indirectly damaged or decreased in value by reason of the acquisition or taking by said city hereunder of any land or lands or the acquisition, taking or diverting of any waters of said north branch of the Pawtuxet river or any waters tributary thereto under the provisions of this act, shall have the right to claim and recover just compensation for such damage or decrease in value. Said board may agree with such owner or owners as to the amount of such just compensation, and thereupon said city shall pay the same to such owner or owners forthwith, and, in default of such agreement, such just compensation shall be determined and be collectible in the same manner as is hereinafter provided for determining and collecting the damages for land taken hereunder; *Provided,* such owner or owners shall file in said superior court for Providence county, or the county in which is situated the land on which such business is located, his or their petition or application for an assessment of such damages not

later than one year after said city shall begin to draw water from such reservoir or reservoirs for such water supply for said city.

SEC. 17. Any person who is employed in any manufacturing establishment that is acquired or taken hereunder for any of the purposes of this act and who is not an owner or part owner thereof or of any interest therein, and is so employed at the time of such acquisition or taking, and who is obliged by reason of such acquisition or taking to seek or take employment elsewhere, may claim and recover any damages suffered by him in consequence of such acquisition or taking, not exceeding the sum of his wages for six months at the rate of wages paid to him for the last six months prior to the termination of his said employment. Said board may agree with such employee as to the amount of such damages, and thereupon said city shall pay the same to him forthwith, and in default of such agreement such employee may, within one year from the date of the termination of said employment, file his petition in equity for an assessment of such damages in said superior court for Providence county. Any number of persons suffering such damage may unite in one or more such petitions, and the withdrawal of any shall not prejudice the rights of others. Said court shall adjudicate such claims respectively, and execution shall issue against said city for the amount of damages found by the court in favor of each such persons.

SEC. 18. Said town of Scituate, the city of Cranston, and each water or fire district therein now or hereafter incorporated, and each other town, city or water or fire district now or hereafter incorporated having any of

its territory included in the drainage district of said north branch of said Pawtuxet river, or of the drainage district of said Pawtuxet river below the junction of the north and south branches of said river, shall have the right to take and receive water from said storage reservoir or reservoirs, said aqueduct or the reservoir of said city at said Sockanosset, for use for domestic, fire and other ordinary municipal water supply purposes in the town of Scituate or the city of Cranston, or such water or fire district therein, or in any part or parts of such territory or territories of such other town, city or water or fire district as are included in either of said drainage districts where there is no public water supply being furnished by any public or *quasi* public body or corporation at the time such town, city or water district decides to take such water. The town of Warwick or any water or fire district therein shall have the further right to take and receive water as aforesaid for use as aforesaid in any part of its territory lying easterly of the New York, Providence and Boston railroad line of the New York, New Haven and Hartford Railroad Company and northerly of Greenwich bay, where there is no public water supply being furnished as aforesaid. Proper connections with said water supply source or sources, including the installation of proper meters or other devices for ascertaining the quantity of water so taken, shall be made at such suitable location or locations as shall be approved by the officer or officers in charge of the water works of said city of Providence, and at the expense of the town, city or district desiring to take such water, and subject to such reasonable rules and regulations as from time to

time may be made by said city of Providence or its duly authorized officer or officers in charge of its water works. Such town, city or water or fire district shall have the right to take such water as aforesaid to any extent each month not exceeding an average per day of one hundred gallons per capita of the number of inhabitants of such parts of its territory or territories as are served from such water supply source or sources, as such number of inhabitants was shown by the last preceding census of the United States or of the State of Rhode Island, unless and to the extent and for the time only that said officer or officers of said city of Providence shall consent to the taking by such town, city or water or fire district of a greater quantity of such water. Such town, city or water or fire district shall pay to said city of Providence such fair wholesale rates or charges for the quantity of water taken by it as aforesaid, and at such times, and the rates fixed to continue during such periods, as may be mutually agreed upon, or in default of agreement as shall be determined by three arbitrators, one to be chosen by it, one by said city of Providence and the third by the two so chosen, or in case either party should refuse or neglect to appoint such arbitrator, or in case the two arbitrators chosen by the parties should refuse or neglect to appoint the third arbitrator, said superior court for Providence county, upon petition of either party and after giving the other party opportunity to be heard, shall appoint such arbitrator or such third arbitrator as the case may be. Said city of Providence may furnish water from such water supply source or sources to any incorporated water company for use as aforesaid in any ter-

ritory included in either of said drainage districts, where at the time of beginning to furnish such water there is no public water supply, whether by a public or *quasi* public body or corporation other than the water supply of such water company, in any part of the territory that is supplied by such water company, or for use as aforesaid in said territory in Warwick easterly of said railroad line and northerly of said Greenwich bay.

(Section 19 provides for the construction of reservoir or reservoirs, aqueduct and other works, after the acquisition by the City, by purchase or condemnation, of the necessary land therefor.)

SEC. 20. Said board and the engineers, surveyors and other agents or servants of said board are hereby authorized to enter upon any lands or waters within said area shown within red lines on said plat, or elsewhere, for the purpose of making and to make any examinations, investigations, or surveys required for the efficient exercise or performance of any or all the powers or duties of said board hereunder, and said city shall pay to the owner or owners of such lands any and all damages suffered by them by reason thereof, and if the amount of any such damages is not agreed upon or paid, such owner or owners may recover the same of said city as hereinafter provided. Any such damages relative to any lands taken hereunder accruing during any time prior to the time of such taking may be recovered as part of the damages for the taking of such lands. Any such damages may be recovered in an action of the case relative to any

lands not taken hereunder before the time such action is brought; *Provided*, that such action is brought in said superior court for Providence county within two years from the time such cause of action accrues and not thereafter.

SEC. 21. Said city from time to time may lease any of its lands acquired by purchase or condemnation hereunder, which are not required for such reservoir or reservoirs or other works, but are held to protect and preserve the waters thereof and the waters of said river branch and its tributaries from pollution, for such consideration or rent and upon such terms and conditions, including especially any restrictions upon the use of such leased lands and any buildings or improvements thereon, to prevent any such pollution, as may be prescribed by said board or authorized representative or representatives of said city or by the city council thereof, and until otherwise provided by said city council said board in its discretion and in the name and behalf of said city may make any such leases; *Provided*, that every such lease shall contain a condition providing in substance that if any occupation or manner of use of any such leased lands or any buildings or improvements thereon, causes, or in the opinion of said board, such representative or representatives or said city council is liable to cause, any such waters be polluted, said board, such representative or representatives or said city council may at any time terminate such lease by giving the lessee or lessees at least thirty days prior notice of such termination in writing. The lessee or lessees shall quit the premises at the time fixed in such notice, or shall be liable to be dispossessed

thereof in any lawful manner or by means of any legal action the same as other tenants holding over their terms. Nothing herein shall be construed to deprive said city of any injunctive remedy to prevent any such pollution or threatened or impending pollution of any of such waters.

SEC. 22. The term "land" or "lands," when used in this act relative to any acquisition or taking by said city hereunder, shall, except so far as the meaning is restricted or limited by the express provisions of this act, be construed to signify and embrace all uplands, lands under water, the waters of any river, lake, pond or stream, all water rights or privileges, and any and all easements and incorporeal hereditaments, and every estate, interest and right, legal and equitable, in land or water, including terms for years, and liens thereon, and any real estate acquired or used for railroad, highway, cemetery or other public or *quasi* public purpose or purposes and whether acquired by, or held by title derived under, eminent domain or otherwise.

SEC. 23. Relative to every taking by said city of Providence under the authority of this act of any land or lands, or any estates, easements, rights or interests in any land or lands, or any waters or water rights or privileges, said board or other authorized representative or representatives of said city shall prepare a description of the same as proposed to be taken and also a plat showing such land or lands, together with a list of the owners thereof and persons interested therein so far as known to said board or such representative or repre-

sentatives and shall submit such description and plat, together with such list to the city council of said city for its action on such proposal.

Whenever the city council of said city shall pass any resolution to take any land or lands, or any estates, easements, rights or interests in any land or lands, or any waters or water rights or privileges, for any such purpose or purposes under any authority in this act contained, said city council within three months from the date of the passage of such resolution shall cause to be filed in the office of the town clerk or city clerk of each town or city, in which any such land or lands lie, or in which lie any such land or lands, which would be damaged by the taking of any such waters or water rights or privileges, a statement, containing a description of such land or lands or waters or water rights or privileges and specifying the nature or extent of the title therein taken, as certain as is required in a common conveyance of land, and stating that the same are taken pursuant to the provisions of this act, and stating the purpose or purposes for which the same are taken hereunder, and also to be filed in such office a plat of such land or lands, but not necessarily including in such plat any lands damaged simply by the taking of any water or water rights.

Upon the filing of such statement and plat, or statement, as the case may be, the title of such land or lands, or estates, easements, rights or interests in land or lands, or waters or water rights or privileges shall vest in said city of Providence in fee simple, unless a less estate or interest therein is specified in such state-

ment as taken by said city, in which case such land or lands, or estates, easements, rights or interest in land or lands, or waters or water rights or privileges shall vest in said city to the extent and according to the nature of the title therein taken. After the filing of such statement and plat or statement said city may take possession of and enjoy the use of any such land or lands or any estates, easements, rights or interests in any land or lands, or any waters or water rights or privileges taken as aforesaid; *Provided, however,* it shall not take actual possession of any such land or lands, or estates, easements, rights or interests in land or lands, or any buildings or improvements thereon, or any such waters or water rights or privileges, without the consent of the owner or owners thereof, respectively, until after the expiration of one year from the date of the filing of such statement and plat or statement, but this proviso shall not affect the provision of Section 20 hereof, or prevent said city from taking actual possession, at the expiration of three months from such date, of any strips of land taken or to be used for roadways, or of any lands taken for said aqueduct or ways thereto or for said relocation of any part of said railroad of said Providence & Danielson Railway Company.

After such filing of such statement and plat or statement, notice of the taking of such land or lands and such estates, easements, rights and interests in land or lands and such water rights and privileges shall be served upon the owners of, and persons having such estates, easements, rights and interests in, and persons interested in, such land or lands and such

waters and water rights and privileges by the city sergeant of said city of Providence leaving a true and attested copy of such statement with each of such owners and persons personally or at his last and usual place of abode in this state with some person living there, and in case any such person or persons are absent from this state and have no last and usual place of abode therein occupied by any person, such copy shall be left with the persons, if any, in charge of or having possession of such land or lands taken of such absent persons, and another copy thereof shall be mailed to the address of such absent persons if the same is known to said officer; and after such filing of such statement and plat, or statement, the city clerk of said city shall cause a copy of such statement to be published in some newspaper or newspapers published in said city at least twice a week for four successive weeks. On the request of any such owner or person within one year after such taking, said city shall, within thirty days after such request, furnish him with a plan or description in writing of his land or lands or water rights so taken.

If any such owner or persons shall agree with said city upon the price of his land or lands or his estate, easement, right or interest in such land or lands or his waters or water rights or privileges so taken, the same shall be paid to him forthwith by said city of Providence.

Any owner of, or person entitled to or interested in, any such land or lands or any such estate, easement, right or interest in any such land or lands or any such waters or water rights or privileges so taken, who shall not

agree with said city of Providence upon the price of his land or lands or his estate, easement, right or interest in such land or lands or his waters or water rights or privileges so taken, may within one year after personal notice of said taking, or if he have no personal notice may within two years from the date of such filing of such statement and plat or statement apply by petition, to the superior court within and for the county of Providence, or the county in which the land or any part thereof taken or damaged as aforesaid by such taking is situated, setting forth the taking of his land or lands or his estate, easement, right or interest in such land or lands or his waters or water rights or privileges, and praying for an assessment of damages by a jury. Upon the filing of said petition, said court shall cause twenty days' notice of the pendency thereof to be given to said city by serving the mayor of said city with a certified copy thereof, and may proceed after such notice to the trial thereof, and such trial shall determine the damages by him sustained by such taking of his land or lands or his estate, easement, right or interest in such land or lands or his waters or water rights or privileges, and including any lands, works and machinery surrendered by him to said city under the authority of this act, and in case of such town or district any furniture or building equipments surrendered by it to said city under the authority of this act, and in case of said Providence & Danielson Railway Company, its successors and assigns, all their said damages, and judgment shall be entered upon the verdict of such jury and execution shall be issued against said city therefor,

and such trial shall be conducted in every respect as other civil cases are tried, including the right to except to rulings and apply for new trial for cause. In case of conflicting claims to any such land or lands or to any estate, easement, right or interest in any such land or lands, or to any waters or water rights or privileges, so taken, by any two or more such petitioners, said court may set down the petitions of such petitioners for trial at the same time by the same jury, and may frame all necessary issues for the trial thereof.

In case any owner of, or person having any estate, easement, right or interest in, or interested in, any such land or lands or such estates, easements, rights or interests in land or lands, or such waters or water rights or priviliges so taken, shall fail to receive personal notice of the taking thereof, and shall fail to file his petition as provided herein said court in its discretion may permit the filing of such petition subsequent to said period of two years from such filing of such statement and plat or statement: *Provided*, that such owner or person shall have had no actual knowledge of such taking in season to file such petition and provided that said city of Providence, after such filing of such statement and plat or statement, shall not have paid any other person or persons claiming to own such land or lands or such estate, easement, right or interest in land or lands, or such waters or water rights or privi- be liable to pay for the same under any judgment rendered against said city under the provisions of this act.

Instead of claiming an assessment of damages by jury as above provided, any such

owner or person may, within the time hereinbefore prescribed for claiming such assessment, apply to the superior court for the county of Providence for the assessment by a commission of such damages as such owner or person sustained by such taking; and said court may from time to time appoint a disinterested commission or commissions, as it shall deem necessary, to hear and determine such applications. A person who is a resident or taxpayer in the city of Providence shall not thereby be disqualified from acting as such a commissioner in any case in which the person or corporation applying for assessment of damages shall not object to such person. Any commission so appointed shall hear and determine such petitions as are referred to it by said court, and shall, as soon as it arrives at an award, report each of the same to said court, which shall fix the time for hearing any objections thereto. If there are no objections to such award, the court shall confirm the same; if objections are filed to such award the court shall proceed to hear the same, and may confirm said report or refer the same for a new or further hearing to the same or another commission, or may itself fix the amount of the award, as in its judgment shall be in accordance with the rights and equities of the parties. In all cases, any party in interest shall have the same right to an appeal from the decision of the court as is provided by law in equity causes determined by decree of said superior court. Upon the final determination of the amount of the damages awarded as aforesaid, execution shall issue in favor of the petitioner and against said city therefor. The compensa-

tion and expenses of each such commission shall be paid by said city as and when allowed by said court.

SEC. 25. Until otherwise provided by the city council of said city of Providence, said board shall have authority to represent said city in the making of such agreements, and to agree for said city with any such owners or persons upon the price or value of their land or lands or of their estates, easements, rights or interests in such land or lands or of their waters or water rights or privileges, so taken, either before or after the filing of any such petition or application by such owners or persons, and may for said city agree to settle any claims under any such petitions or applications and any damage or other claims or actions against said city under this act for such sum or sums of money as it may reasonably determine. When any such agreement is made, said board shall cause its certificate in writing containing the substance of such agreement and signed by the chairman or any chairman *pro tempore* or a majority of the members of said board to be filed with the city auditor of said city, and when any required receipt, discharge, release, deed, title, certificate or other lawful condition is furnished or observed, said city shall forthwith pay the sum of money called for by such agreement to the person or persons entitled thereunder.

Until otherwise provided by said city council, said board shall have general authority to represent said city and to make any agreements for said city hereunder, and to do any acts or things necessary for or incidental to

executing or accomplishing the purposes hereof and the plans of the city council of said city adopted hereunder, but not to any extent or in any manner inconsistent with any of the express provisions of this act. When said board for said city takes actual possession of any land or lands acquired by purchase or condemnation hereunder, it may sell, dispose of and cause to be removed any buildings or improvements thereon which would obstruct the work hereunder or should be removed to accomplish the purposes hereof; and in settling any claims for damages for any lands or land taken hereunder, said board may agree that any such buildings or improvements may be removed by the owner or owners from whom the same were taken in part satisfaction of such damages, but within such express time as will not impede any such work or materially delay the accomplishment of such purposes. Relative to any such sales, said board in the name and behalf of said city may give to the purchaser a bill of sale of the property sold. All sums of money received by said board from any such sales shall be forthwith paid into the treasury of said city.

SEC. 26. Said city of Providence is hereby authorized and empowered from time to time to hire any and all sums of money necessary, and to exclusively use the same, to defray the costs of securing such water supply, including all costs of acquiring such lands, interests in lands, waters and water rights and privileges, by purchase or condemnation, or both and all such construction costs and all other expenses of said city and said board hereunder, and to issue its notes and bonds or either therefor,

37

and to renew such notes from time to time as the same become due. Said city council shall cause any bonds issued by authority hereof to be issued for such time and in such amounts as shall be fixed by said city council, and after any issue of any such bonds said city council shall annually appropriate, so long as any such bonds are outstanding, a sum sufficient to pay the interest thereon. Said city shall continue to maintain a sinking fund for the redemption of all outstanding issues of water bonds and of all issues of bonds under the authority hereof as they respectively become due, and all excess of receipts from water rents over and above the necessary expenses of managing the water works of said city, the interest on loans and bonds issued on account of such water works, and any amounts transferred to any water works depreciation or extension fund of said city, shall be placed in said sinking fund for said purpose. All premiums arising from the sale of the bonds issued by authority hereof shall be placed to the credit of said sinking fund. The net proceeds from the sale or lease of any buildings or lands authorized hereunder to be sold or leased shall be placed in said sinking fund for said purpose.

Said board from time to time and as often as once a year shall report to said city council its estimates of the amounts of money needed during the ensuing year in the execution of the provisions of this act and to meet the obligations of the city arising from the exercise of the powers and authority herein contained, in order that said city council may make seasonable provision for obtaining the necessary funds therefor.

SEC. 28. The right of exercising the powers to take any such land or lands or any estates, easements, right or interest therein, or any waters or water rights or privileges, as herein conferred on said city, shall be exercised by said city within the period of two years from and after the date of the passage of this act and not thereafter.

SEC. 29. This act shall take effect upon its passage.

THE CONSTITUTIONAL QUESTIONS RAISED.

Said water supply act (Public Laws, 1915, Chap. 1278) is unconstitutional and void in that it violates the provisions of Article XIV of the Amendments to the Constitution of the United States in this:—

I. That under said act the taxpayers of the city of Providence are to be burdened by a large and unnecessary expenditure and by an expenditure which is not wholly for the benefit of the city of Providence but in part for the benefit of other municipalities, corporations, or companies outside of the city of Providence which do not contribute to any portion of the expenditure for said water supply, or if they do, such contribution is not by said act required to be just compensation to the city of Providence.

II. That said act denies to persons within the jurisdiction of the State of Rhode Island the equal protection of the laws in that it permits the owner or owners of business located

in the town of Scituate or on said branch of the Pawtuxet river and established prior to the passage of said act, which is directly or indirectly damaged or decreased in value by reason of the acquisition or taking by said city under said act of any land or lands or the acquisition, taking or diverting of any waters of said branch of the Pawtuxet river or any waters tributary thereto under the provisions of said act, to claim and recover just compensation for such damage or decrease in value, but does not allow the owner or owners of any such business so situated, but which was not established at the time of the passage of said act but was established before said city took any action under said act, or which might have been in good faith inaugurated and nearly completed, although not completely "established", to acquire or take any land or waters thereunder, to recover any such compensation for such damages or decrease in value.

III. That while said act allows any mill owner whose mill is situated on land taken by said city under said act to recover the reasonable expense and cost of moving his machinery from the old location at said mill to a new location within the New England States, it does not allow a mill owner similarly situated, whose land and mill are taken, to recover any portion of the reasonable expense of moving said machinery to any location without said New England States, irrespective of the needs of his business or the desirability or necessity of such new location or the cost of such moving.

IV. That said act permits the city of

Providence to take the possession and use of the property of plainiffs in error, and to rent, sell and dispose of the same, not only without offering any compensation therefor or having any compensation therefor permanently or tentatively determined (the whole matter of proceedings to have such damages determined being left as a burden upon the plaintiffs in error, in default of whose action said city may take properties on its own terms, or, so far as appears by said act, without any compensation therefor), but, also, said city is allowed to take possession of all of such properties and to dispose of the same, not only without paying for the same or having any value thereof determined, but also, at a time when the same is not required for the purposes of said act and may never be required therefor, the need for said properties by said city being dependent upon the complete or permanent construction of the dam at Kent, the completion of which will in all probability be long deferred and by possibility may never occur.

V. That under said act the plaintiffs in error and other owners are deprived of their property without due process of law, without remedy by recourse to the laws, conformably to the laws, or by the law of the land, in that their property is allowed to be taken under color of eminent domain by the city of Providence acting under said act, when the questions of the necessity of the taking as a whole or of the taking of the various parcels which are taken have not been decided by the legislature itself, but have been relegated to the city of Providence to decide ex parte, without ap-

peal and without an opportunity to have said questions heard and decided by any impartial tribunal.

For reference, the constitutional provision alleged to be violated by said act or parts thereof is set forth as follows:

CONSTITUTION OF THE UNITED STATES ARTICLE XIV OF THE AMENDMENTS.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

TRAVEL OF THE CASE.

On the 11th day of April, 1921, the plaintiffs in error preferred to the Superior Court of the State of Rhode Island against the defendants in error a bill of complaint in each of said causes, and subpoenas having been duly issued and served upon all the respondents named in said bill of complaint, appearance was entered and a joint and several answer was filed by said respondents thereafter on the 27th day of April, 1921. The fact having been brought to the attention of said Superior Court that the constitutionality of an act of the General Assembly was clearly questioned by allegations of

said bill of complaint and was brought in question upon the record, said constitutional questions were duly certified by said Superior Court to the Supreme Court of said State to be heard and determined. Subsequently, upon the 6th day of July, A. D. 1921 said Supreme Court after hearing, rendered its decision holding Chapter 1278 of the Public Laws of Rhode Island passed at the January Session, A. D. 1915 not in violation of either Article V or Article XIV of the Amendments of the Constitution of the United States and sent back to said Superior Court for further proceedings the papers in the cause with said decision certified thereon.

And thereafter, upon the 12th day of August, A. D. 1921, in said Superior Court, after hearing, said Court pursuant to said decision of the Supreme Court, entered its decree dismissing said bill of complaint with costs to the respondents. That thereafterwards the said complainants duly sued out their writs of error.

POINTS.

I

That Under Said Act, the Taxpayers of the City of Providence Are to be Burdened by a Large and Unnecessary Expenditure and by an Expenditure which is Not Wholly for the Benefit of the City of Providence but in Part for the Benefit of Other Municipalities, Corporations or Companies Outside of

the City of Providence which Do Not Contribute to Any Portion of the Expenditure for Said Water Supply or if They Do, Such Contribution is Not by Said Act Required to be Just Compensation to the City of Providence.

The whole scheme of the act involves a condemnation and taking of such part of the north branch of the Pawtuxet river and water shed tributary thereto as shall constitute the most available and desirable source of water for the City of Providence, *and for any territories now supplied, or hereafter supplied, under the provisions of this act.* (Sec. 3). The 6th section authorizes the acquisition by condemnation of the waters and flowage rights for the proposed supply, but limits the monthly flow from the reservoirs to a given amount, and provides for the disposition of the excess over the quantity needed

> "for a water supply for said City of Providence, and for any territories now supplied, or hereafter supplied, under the provisions of this act, in the City of Cranston, the towns of North Providence, Johnston and Warwick, or elsewhere."

Section 18 specifically provides that "the Town of Scituate, the City of Cranston, and each water or fire district therein, now or hereafter incorporated,"

> "and each town, city or water or fire district, now or hereafter incorporated, having any of its territory included in the drainage district

of said north branch of said Pawtuxet river, or of the drainage district of said Pawtuxet river below the junction of the north and south branches of said river, shall have the right to take and receive water from said storage reservoir or reservoirs, said aqueduct or reservoir of said city at said Sockanosset, for use for domestic, fire and other ordinary municipal water supply purposes in the Town of Scituate, or the City of Cranston, or such water or fire district therein, or in any part or parts of such territory or territories of such other town, city or water or fire district, as are included in either of the said drainage districts, where there is no public water supply being furnished by any public or quasi-public body or corporation, at the time such town, city or water district decides to take such water, * * * proper connections with said water supply source or sources, including installation of proper meters, or other devices for ascertaining the quantity of water so taken, shall be made at such suitable location or locations as shall be approved by the officer or officers in charge of the water works of said City of Providence, and at the expense of the town, city or district desiring to take such water, subject to such reasonable rules and regulations as from time to time may be made by the City of Providence, or its duly authorized officer or officers in charge of its water works. Such town, city or water or fire district shall have the right to take such water, as aforesaid, to any extent each month, not exceeding an average per day of one hundred gallons per capita of the number of inhabitants of such parts of its territory or territories as are served from such water supply, source or sources, as such number of inhabitants was

shown by the last preceding census of the United States or of the State of Rhode Island. * * * Such town, city, or water or fire district shall pay to said City of Providence *such fair wholesale rates or charges* for the quantity of water taken by it, as aforesaid, and at such times, and the rates fixed to continue during such periods as may be mutually agreed upon, or in default of agreement, as shall be determined by three arbitrators, one to be chosen by it, one by said City of Providence, and the third by the two so chosen, or in case either party should refuse or neglect to appoint such arbitrator, or in case the two arbitrators chosen by the parties should refuse or neglect to appoint a third arbitrator, such Superior Court for Providence County, upon petition of either party, and after giving the other party opportunity to be heard, shall appoint such arbitrator or third arbitrator, as the case may be, said City of Providence may furnish water from such water supply source or sources to any incorporated water company for use as aforesaid in any territory included in either of said drainage districts, where at the time of beginning to furnish such water there is no public water supply, whether by public or quasi-public body or corporation, other than the water supply of such water company, in any part of the territory that is supplied by such water company, or for use, as aforesaid, in such territory in Warwick easterly of said railroad line and northerly of said Greenwich Bay."

The significant, and, we believe, unique features of the above quoted provisions of the act are that the City of Providence is to determine upon, and either by condemnation or purchase, acquire suffi-

cient water, water rights and reservoir capacity to supply not only its own immediate and future demands, but the demands of a large adjacent territory outside of its own corporate limits, and that the several municipalities or districts so located have a primary right to be supplied with water from the plant by paying the first cost of the necessary connections, and then for the water so to be enjoyed "such fair wholesale rates or charges" as may either be mutually agreed upon, or fixed by arbitration. The Court is given power to see that the necessary arbitrators are chosen. This primary right to take water is further enjoyed by "any incorporated water company" in the given territory, where at the time of beginning to furnish such water there is no public water supply by a public or quasi-public body or corporation other than the water supply of such water company. No requirement exists for these incorporated water companies to pay for the supply which the city is authorized so to furnish them, nor is any machinery provided, or basis given, for the compensation to be paid by any such incorporated water company. The first cost, including all the damages provided for in the act, is to be paid by the City of Providence. When one considers that these damages include not only the value of the land or waters taken in the enormous area shown on the plat, as well as for the cost of installation and perpetual maintenance of proper gauging stations at the points named in the sixth section; compensation to owners for damages to lands not taken (section 7), and also compensation for the taking of

the Ponaganset reservoir company (id.); the cost of constructing new bridges at highways; the cash value (section 11) of improvements upon any land, as well as furniture and equipment therein contained, including the fair value of machinery set up in mills, and in certain contingencies the cost of removing machinery to other designated localities; the expense of removal and reburial of remains lying in cemeteries required to be taken, including the cost of resetting of old grave stones and monuments and markers of the graves; and indemnity to each city, town, railroad and street railway for all damages suffered by negligence in the plan or method of doing the work; together with all damages to or impairment of pipes, conduits, poles, wires, or other property, located on any highway, and the cost of restoring the same, together with the cost of such additional police protection as may be necessary in any town or city in consequence of the carrying on, or construction of the proposed work (section 14); the damages directly or indirectly suffered by the owners of any land not taken, but lying contiguous to property taken (section 15); and (section 16) the damages which the owners of certain businesses shall have suffered by the taking; and (section 17) the damages of employees employed in manufacturing establishments affected by the taking, not exceeding six months wages, not to speak of other elements, one gains some conception of the expense involved in the enterprise.

All of this expenditure the legislature has imposed upon the City of Providence, and has directed

it (section 26) to borrow—

> "all sums of money necessary, and to exclusively use the same to defray the cost of securing such water supply, including all costs of acquiring such lands, water and water rights and privileges * * *, and all such construction costs and all other expenses of said city and said Board hereunder and to issue its notes and bonds, or either therefor, and to renew any such notes from time to time as the same may become due."

This section further provides for an annual appropriation of a sum sufficient to pay interest on the bonds, together with a sinking fund.

In a word the City of Providence is required to finance the first cost and maintenance of this enterprise which is required to be large enough to supply not only the city itself but such of the outside communities named as shall desire to avail themselves thereof. No provision is made in the act for the imposition upon the outside communities of their proportionate share of the first cost and maintenance of the project. Beyond paying for the expense of connecting up with the main system, all that such of the communities as do avail themselves of the privilege are required to pay to Providence is such fair wholesale rates as may be agreed upon or fixed by arbitration.

We earnestly contend that this unique situation vitiates the entire act and renders it unconstitutional as violating the fourteenth amendment, in that it imposes a burden of taxation upon the citizens of Providence to raise funds with which to pay for an enterprise, the benefits of which apper-

tain to other communities, municipalities and districts, which are not required to bear their true proportionate share of such expense either of construction or maintenance. We presume that no one in this day will question the correctness of the rule laid down in 37 Cyc. 749:

> "The constitutional requirements of uniformity in taxation forbids the imposition of a tax on one municipality or part of the State for the purpose of benefiting or raising money for another."

The note cites cases from several of our courts of last resort which fully sustain the proposition.

Judge Cooley in his authoritative work on Taxation, 3rd edition, vol. 1, p. 225, says,

> "But it is clearly essential, that the purpose shall be one which in an especial and peculiar manner pertains to the district within which it is proposed that the contribution called for shall be collected, and which concerns the people of that district more particularly than it does others * * * The tax collected is a proportionate contribution to public purposes; but to make them such in any true sense, they must not only be such as between the persons called upon to pay them, but also as between those who *ought* to pay them. It is, therefore, of prime necessity in taxation that it should first be determined what public—whether the State or locality—should bear the burden, and that it should then be imposed ratably as between those who constitute that public."

Again, on page 227:

> "A state purpose must be accomplished by a

state tax, and a county purpose by a county tax, or a peculiar purpose for any lesser district by taxation of such district. This is not only just, but it is essential. To any extent that one man is compelled to pay in order to relieve others of a peculiar burden temporarily resting on them, his property is taken for private purposes, as plainly and palpably as it would be as if appropriated to the payment of the debts or the discharge of obligations which the person thus relieved by his payment might owe to private parties."

Again, on page 229:

"The general rule of restricting the levy taxes to the very district concerned, *but making it embrace the whole district,* is so plain and reasonable that it is not likely to be overlooked or disregarded, except in cases in which the facts are such as to raise doubts as to its application."

"A tax on one community for the benefit not alone of that community, but for the common benefit of that and larger communities is void, though it might be otherwise a burden laid on the police power. *Ex-Parte Marshall,* 74 Ala. 266; so where a statute imposed a tax upon a town to educate the entire school district in which the town was a part."

See also

Town of Belpoint vs. Pence (*Ky.*) 17 So. Western Rep. 197.

Auditor General vs. *McArthur,* 87 Mich. 457.

Auditor General vs. *Improvement Company,* 129 Mich. 182., at p. 184.

A leading case is *State, Baldwin, Prosecutor,* vs. *Fuller,* 39 N. J. L. 576, affirmed unanimously 40 id. 615. The whole opinion should be read, but the following extract therefrom is significant (p. 578):

> "But it seems equally clear that a tax for state purposes must fall upon the state at large; for county purposes, upon the county; and for the public uses of any lesser political district, upon such district. The county of Hudson could not be required to defray the entire expense of the state government, nor could one township, in that county, be compelled to yield the whole revenue necessary for county purposes; nor could the legislature impose upon a single citizen the whole burden of taxation in the township in which he may reside. Any such fiscal scheme would be pronounced, by the common judgment of mankind, so contrary to the principles of natural justice, that we would be driven to conclude that there was some radical error in the premises upon which its justification was grounded. Not that courts may pronounce a law which it is within the general sphere of legislation to pass, to be void merely because it is, in their judgment, contrary to the principles of equity. The rule is conceded to be otherwise, but there are some things so repugnant to our sense of justice that we cannot admit that they are comprehended, in our system, in the powers of government. As an instance, we unhesitatingly declare that the legislature cannot make a man to be a judge in his own case. Aside from this consideration, laws of the character specified would, to the extent that one man's property is appropriated by them, in excess of his just contribution, to relieve others of a public burden properly rest-

ing upon them, take private property for public use, without just compensation. It would be confiscation, not taxation."

In *Desty on Taxation,* Vol. 1, section 9, the principle is stated:

"It is of the essence of taxation that it should compel the discharge of the burden by those upon whom it rests, and an attempt to compel a county to pay a charge properly resting on the whole state, would be unconstitutional."

* * *

"A law which would attempt to make one person, or a given number of persons in a guise of local assessment, pay a general revenue for the public at large, would not be an exercise of the taxing power, but an act of confiscation."

The same principle is expressed in another form in the leading case of *Van Cleve* vs. *Passaic,* 71 N. J. L. 574 (a decision of the highest court), where, referring to the doctrine of *Baldwin* vs. *Fuller,* the court says:

"That principle which is in effect a paraphrase of the maxim that taxation and representation go together requires that the district to be taxed shall be co-terminus with a district to which some right of local self-government is given and hence is, from its nature, equally applicable to a case in which the grant of governmental power does not extend over the whole of the area covered by the delegated power of taxation. In every such case so much of the area of taxation as lies outside the political district would inevitably present the reprobated situation in that it would be taxed by an agency with which it had no political relationship."

Followed in *Passaic Valley Sewerage Com. v. Jersey City*, 92 N. J. L., p. 265.

In 1 *Farnham* on *Waters and Water Rights*, Section 152 a, the doctrine is thus expressed:

> "If the water supply is furnished for only a section of the municipality and a tax is needed to meet the expense, the section benefited should bear the expense and it should not be thrown upon the people at large."

In *People* vs. *Sisson*, 77 N. Y. Supp. 376, an attempt was made to throw the burden of a water supply for two villages in a township eighteen miles long and six miles wide, the village having an area of less than one square mile, upon the township. In holding the scheme illegal the court said:

> "The area to be designated as a water supply district must be just the area which the authorized contract is to supply with water. * * * It is needless to say that here is a clear attempt to pervert the law both in its letter and spirit—an attempt to make those who are not benefited pay for the benefit enjoyed by others. This the law neither authorizes or permits. * * * A district established cannot properly be greater than the district to be supplied. A large district cannot be designated for the purpose of taxation to pay for a water supply to a part only of such district."
>
> Affirmed in *People* vs. *Sisson*, 173 N. Y. 606.

The converse of the proposition is, of course, true. A small district cannot be designated for the

purpose of taxation to pay for a water supply for a larger district than that taxed.

Now the question presents itself, in view of the nature of the rights of the other communities to enjoy the water supply, why the legislature in framing this scheme did not create a water district comprising both the City of Providence and the outside communities. This was the scheme in Massachusetts in providing for a metropolitan water supply for the City of Boston and the outlying communities. The act is Chapter 488 of the Laws of 1895 of the Commonwealth of Massachusetts. In brief, it provides for the appointment by the Governor of a metropolitan water board and authorizes the construction, maintenance and operation of a system of metropolitan water works sufficient to supply the cities of Boston, Chelsea, Everett, Malden, Medford, Newton, Somerville and other places, which places shall constitute the metropolitan water district. The board is authorized to take the necessary land and water to create a sufficient supply for the district and such other towns as have subsequently been added thereto in the manner provided by the act, and is further permitted to draw upon the treasurer of the Commonwealth to pay therefor and the Commonwealth is likewise authorized to issue bonds, the proceeds whereof shall be applied to the payment of the cost and damages for the construction of the water works. The State Treasurer is required annually to estimate the amount required to be raised during the year to pay the interest, sinking fund requirements, expenses of maintenance and operation of

the works and to apportion to the several communities enjoying the water, such proportion thereof as the values of the several communities bear to the total valuation of the district. Provision is made for the entrance into the district of several other cities and municipalities named, which are required, before they acquire the right to use the water, to pay to the Commonwealth for the sinking fund a fair proportion of the cost incurred by the Commonwealth for the construction, maintenance and operation of the works. This act has been amended in many important particulars by later legislation, but the general scheme as above outlined has been studiously maintained.

We are not contending that if a water supply is provided with an eye to future needs, and more than adequate for the current needs, the municipality can not be legitimately taxed therefor, although temporarily other communities are permitted to enjoy for a consideration the benefits thereof. The principle for which we contend does not require a municipality to waste water that may be temporarily more abundantly supplied than its current needs require.

Mayo vs. *Dover & Foxcroft Village Fire Co.* (Me.) 53 Atl. Rep. 62; 96 Me. 539.

This, however, is not the case here. The rights of the other communities are just as permanent, fundamental and primary in the proposed supply as are those of Providence itself.

The distinction between the two schemes is fundamental, and accentuates the point we are

making; we refer to the Massachusetts and the Providence schemes. Such of the outside communities as decide to avail themselves of this supply are not required to pay a proportionate share of the cost of constructing and maintaining the works. No relation is by the act established between the additional cost incurred in the original construction in order to provide for the demands of a given outside municipality and the contribution that shall be made by such municipality for the privilege of enjoying the supply. After it shall have made and paid for its connection all that such community is required to contribute is "such fair wholesale rates and charges for the quantity of water taken", as may be agreed upon or determined by arbitration. The act treats the water supplied to the outside community as a commodity and restricts the parties or the arbitrators in fixing the price to be paid, to the "fair wholesale rates or charges for the quantity of water supplied", totally without regard to whether such wholesale rates bear any relation to the additional original cost, or the additional cost of maintaining arising from the fact that provision was required to be made for the contingency of the given communities coming in. It is well known that throughout the country water companies exist, and are supplying water to consumers at recognized wholesale rates—so much per million gallon—and it is evident that by this act the legislature intended that any given community, whether its consumption be great or small, shall only be required to pay wholesale rates or charges, regardless altogether of the amount of

the cost to the City of Providence, both in construction and operation, occasioned by the necessity of providing for this additional demand. It will not do to say that any agreement that might be made between the two communities would necessarily bear these elements in mind in fixing the wholesale rates. The act makes no provision for ascertaining and segregating the cost of the works attributable to the acquisition of a certain supply for the outside communities, and no one can tell how many, if any, of the communities will come in. Indeed, none of them may, as none of them is required to do so. Hence, if they don't apply then Providence is foisted with the obligation to pay for, and annually maintain, a supply that will be sufficient to provide for these communities should they ever, at the remotest possible time, determine to come in. Moreover, there is no obligation upon the parties to agree, and the scope of their agreement is limited to the fair wholesale rates. Should they not agree, then Providence is subjected to the award of three arbitrators, who are governed by no legal principle in reaching a conclusion, beyond the fact that the sum given shall be "the fair wholesale rate".

What Providence and its citizens are entitled to, if this plan is to be carried into effect, when the water is taken by any or all of these communities, is just compensation. That is, reimbursement for so much as it has paid, and annually continues to pay, on account of the construction and maintenance of a plant sufficiently large to accommodate the additional requirement. Anything less than

just compensation violates fundamental constitutional principles. Here the legislature instead of requiring that just compensation shall be paid to Providence sets up an arbitrary and elusive standard. This the legislature is prohibited from doing.

Monongahela Navigation Co. vs. *The United States,* 148 U. S. 312, 327.

Reagan vs. *Farmers Loan & Trust Co.,* 154 U. S. 362, *Newburyport Water Company* vs. *The City of Newburyport,* 103, Fed. Rep. 584; *Fairbanks* vs. *United States,* 181 U. S. 300-301; *United States* vs. *Rogers,* 255 U. S. 169; *Union Bridge Company* vs. *United States,* 204 U. S. 397.

What right has the legislature to require the City of Providence to incur this unnecessary and additional expense—both initial and annual—for which its citizens by taxation are compelled to pay, and then set up a purely arbitrary and illusive system of payment when, if ever, any of the authorized communities shall avail themselves of the supply? Suppose they never avail themselves; or suppose one does and others do not; or suppose all do; in none of these possible contingencies is there an adequate scheme in the law for the reimbursement of Providence.

Again, attention is directed to the fact that at the end of Section 18, the city is given the right to furnish water to any incorporated water company in any of the territory included in either of the drainage districts, where, at the time of beginning to furnish the water, there is no public water supply.

It will be noted that no provision for compensation here exists, and while, of course, the city is not required but only authorized to furnish water, nevertheless, in these days of municipal corporate mismanagement, it is not beyond the possibilities, nor is it unlikely, that official indifference would be so great, as to make it readily imaginable that the city authorities might favor influential water companies by giving them supplies without exacting compensation. In cases of this kind there must be a lawful legislative scheme. Nothing is left to intendment, and the city is able under the act to make an arrangement to supply water to a company without exacting any compensation.

Now if the method of compensation above discussed and provided for in cases where other municipalities come in be vicious, *a fortiori*, how much more vicious is that portion of the scheme which permits the city, after having caused its taxpayers to assume the burden of this great expenditure to donate without any required compensation, the use of the non-limited amount of water to incorporated companies.

Should the court determine, as we think is arguable, that the use by these private incorporated water companies is not necessarily a public one, then the act would necessarily be vicious, as providing for the taking of private property for private use. See *Miller* v. *Town of Pulaski,* (Va.), 63 S. E. Rep. 881; *Boyd* v. *Ritter & Co.*, 119 Va. 348, at p. 365; *Jeter* vs. *Vinton, etc.*, 114 Va. 769, at p. 776.

There can be no question of the right of taxpayers, such as are Theresa B. Joslin and the Joslin

Manufacturing Company, to raise these questions, and to prohibit the carrying into execution of this plan that has these illegal characteristics permeating and characterizing the whole act.

1 *Farnham on Waters*, Sec. 153.

Elyria Gas & Water Co. vs. *Elyria*, 57 Ohio 374; 49 N. E. Rep. 335.

Green v. *Commission*, 90 Ohio State 252 at p. 255.

II and III

Said Act Denies to Persons Within the Jurisdiction of the State of Rhode Island the Equal Protection of the Laws and Deprives Them of Their Property Without Just Compensation:

A. *Because it fixes the compensation, or determines in what it shall consist or prescribes the rules and principles upon which it shall be computed.*

2 *Lewis Eminent Domain*, p. 1173 and note 85.

The act under review clearly fixes compensation in certain instances, determines in what it shall consist in others, and in still others, prescribes with great definiteness the rules and principles upon which it shall be computed. For convenience, therefore, in referring to those sections of the act complained of in this respect, the attention of the court is again respectfully directed to the following provisions of said act:

Sec. 11. The furniture and building equipments in any building belonging to the town of Scituate, which building is condemned by the city of Providence, may be surrendered to the city and the city shall pay therefor "the fair value of the same (furniture, &c.) at the time of such delivery as part of the damages" for such taking.

Sec. 12. (a) The machinery in a mill condemned under the act may be surrendered, and the city shall pay "the fair value of the same at the time of such delivery as part of the damages for such taking."

(b) If the machinery in a mill condemned under the act is not surrendered and the city shall require its removal before a reasonable time, the city shall "compensate said owner for the special damages * * * suffered * * * by reason of the removal of said machinery * * * before the time that otherwise would be reasonable."

(c) If the machinery in a mill condemned under the act is not surrendered, the "city shall pay * * * as a part of * * * damages for the taking of said mill the reasonable expense and cost of removing such machinery from its old location at said mill to a new location within the New England States, of setting up such machinery in the place therein in which it is to be used by said owner. The amount of such reasonable cost and expense, if not agreed upon by the parties, shall be determined in the same manner as is provided herein for the determination of damages for the taking of lands, or interests, or rights therein."

Sec. 14. (a) "Said city shall pay for the cost of such additional police protection as may be necessary in any town or city in consequence of the carrying on of any work of building such reservoir * * * aqueduct or * * * road work * * * during the progress of such work therein."

(b) "Any sums of money due from said city * * * on account of any express liabilities of said city * * * which are not * * * provided to be recovered as damages for any taking * * * shall be recoverable * * * in an action of the case * * *."

Sec. 15. "The owner * * * of any land not taken * * * but contiguous to any land * * * taken, which is directly or indirectly decreased in value by reason of such acquisition * * * by said city, shall have the right to * * * recover damages for such decrease in value; * * * such damages shall be determined * * * in the same manner as * * * for determining * * * the damages for land taken * * *."

Sec. 16. "The owner * * * of any business located * * * in * * * Scituate or on said north branch of the Pawtuxet river and established prior to the passage of this act which is directly or indirectly damaged or decreased in value by reason of the acquisition * * * of any land * * * or the acquisition, taking or diverting of any waters of said * * * branch or * * * tributary thereto * * * shall have the right to * * * recover just compensation for such damage or decrease in value * * * to be determined * * * in the same manner as * * * for

determining * * * damages for land taken * * * *."

Sec. 17. "Any person * * * employed in any manufacturing establishment * * * taken * * * for any of the purposes of this act and who is not an owner or part owner * * * and is so employed at the time of such acquisition * * * and who is obliged to seek * * * employment elsewhere, may * * * recover any damages suffered by him in consequence of such acquisition or taking, not exceeding the sum of his wages for six months at the rate of wages paid to him for the last six months prior to the termination of his said employment" (to be determined upon petition to the superior court for an assessment of such damages).

B. And because such a determination of what is just compensation is not a legislative, but a judicial function.

It is not a legislative, but a judicial function to determine what is just compensation for property taken under the power of eminent domain. Legislatures cannot invade the constitutional province of courts and juries, and after taking, fix the price to be paid, nor limit, by legislative enactment, that judicial function, by the establishment of rules and principles governing the admeasurement of the compensation to be paid.

Monongahela Nav. Co. vs. *U. S.*, 148 U. S. 312, 325, 327; 13 Sup. Ct., 626; 37 L. Ed., 468.

The Federal Government, by act of Aug. 11, 1888,

provided that a certain lock and dam number seven be taken, but in determining compensation therefor, and *"in estimating the sum to be paid by the United States, the franchise of said Corporation to collect tolls shall not be considered or estimated."*

Said Mr. Justice Brewer, in an exhaustive opinion on the subject: (p. 325)

> "And with respect to constitutional provisions of this nature it was well said by Mr. Justice Bradley, speaking for the court in *Boyd* vs. *United States,* 116 U. S. 616, 635 (29; 746, 752), 'illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the rights, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be, *abstra principiis.* (p. 327.)
>
> *"By this legislation congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial, and not a legislative question. The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public taking the prop-*

erty, through congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry. In *Charles River Bridge Props.* vs. *Warren Bridge Props.*, 36 U. S. 11 Pet. 420, 571 (9:773,833), Mr. Justice McLean in his opinion, referring to a provision for compensation found in the charter of the Warren Bridge, uses this language: 'They (the legislature) provide that the new company shall pay annually to the college, in behalf of the old one, one hundred pounds. By this provision it appears that the legislature has undertaken to do what a jury of the country only could constitutionally do: assess the amount of compensation to which the complainants are entitled.' See also the following authorities: *Com.* vs. *Pittsburgh & C. R. Co.*, 58 Pa. St. 26, 50; *Pennsylvania R. Co.* vs. *Baltimore & O. R. Co.*, 60 Md. 263; *Isom* vs. *Mississippi Cent. R. Co.*, 36 Miss. 300. In the last of these cases and on page 315, will be found these observations of the Court: 'the right of the legislature of the state, by law, to apply the property of the citizen to the public use, and then to constitute itself the judge of its own case to determine what is the "just compensation" it ought to pay therefor, or how much benefit it has conferred upon the citizen by thus taking his property without his consent or to extinguish any part of such "compensation" by prospective conjectural advantage, or in any manner to interfere with the just powers and province of Courts and juries in administering right and justice, cannot for a moment be admitted, or tolerated under our constitution. If

anything can be clear and undeniable upon principles of natural justice or constitutional law, it seems that this must be so.' We are not, therefore, concluded by the declaration in the act that the franchise to collect tolls is not to be considered in estimating the sum to be paid for the property."

Reagan vs. *Farmers Loan & Trust Co.*, 154 U. S. 362, at 409-410.

In this important case, the Legislature of the State of Texas, through its Railroad Commission, fixed a schedule of railroad rates which were so low as to prohibit the company from earning a fair return upon the investment. The complainant, mortgagee of the road, filed its petition to establish the unconstitutionality of the act, and the court said: (pp. 409-410)

"They refer to the postal system of the United States, which, carried on for the common welfare, not infrequently results in a loss which is made good out of the public treasury. But the parallel is not good. In the case suggested the loss is cast through taxation upon the general public, and all bear their proportionate share of that loss which is incurred in securing a common benefit, while the scope of this legislation is to secure such common benefit at the expense of a single class. *The equal protection of the laws—the spirit of common justice—forbids that one class should by law be compelled to suffer loss that others may make gain. If the state were to seek to acquire the title to these roads, under its power of eminent domain, is there any doubt that constitutional provisions would require the pay-*

ment to the corporation of just compensation, that compensation being the value of the property as it stood in the markets of the world, and not as prescribed by an act of the legislature."

Kilbourn vs. *Thompson*, 1880, 103 U. S. 168.

MR. JUSTICE MILLER: * * * "It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers entrusted to governments, whether state or national, are divided into the three grand departments of the executive, the legislative and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system, that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other. To these general propositions there are in the Constitution of the United States some important exceptions. One of these is, that the President is so far made a part of the legislative power, that his assent is required to the enactment of all statutes and resolutions of Congress."

* * *

"In the main, however, that instrument, the model on which are constructed the fundamental laws of the States, has blocked out with singular precision, and in bold lines, in its three primary Articles, the allotment of power to the executive, the legislative, and judicial departments of the government. It also remains true, as a general rule, that the powers confided by the Constitution, to one of these departments cannot be exercised by another."

"It may be said that these are truisms which need no repetition here to give them force. But while the experience of almost a century has in general shown a wise and commendable forbearance in each of these branches from encroachments upon the others, it is not to be denied that such attempts have been made, and it is believed not always without success. The increase in the number of States, in their population and wealth, and in the amount of power, if not in its nature to be exercised by the Federal Government, presents powerful and growing temptations to those to whom that exercise is intrusted, to overstep the just boundaries of their own department, and enter upon the domain of one of the others, or to assume powers not intrusted to either of them." * * *

Newburyport Water Co. vs. *City of Newburyport,* C. C. Dist. Mass., Aug. 8, 1900, 103 Fed. Rep. 584.

In this case the legislature of Massachusetts authorized a municipal corporation, for public uses, to acquire a system of water works belonging to a private corporation, under the following conditions:

(p. 585.) "That the city should pay to the company the fair value thereof, which, if not agreed upon, should be determined by three commissioners * * * 'for the purposes of its use by said city,' and 'without enhancement on account of future earning capacity or good will, or on account of the franchise of said company'." * * *

The case was heard before Mr. Circuit Judge Colt and Mr. District Judge Brown, and in an interesting and elaborate opinion by Judge Colt, the act was held unconstitutional as depriving the water company of its property without just compensation. The opinion says:

(p. 586) * * * "A taking under an act providing such a method of compensation would be unconstitutional, because without just compensation. It would be a taking 'without due process of law,' in violation of the fourteenth amendment. Where private property is taken for public uses, *the legislature cannot fix the compensation, or determine in what it shall consist, or prescribe the rules and principles upon which it shall be computed.* Lewis, Em. Dom., Sec. 461. *When a taking has been ordered, the question of compensation is judicial, not legislative.*

The legislature cannot extinguish any part of such compensation, or in any manner 'interfere with the just powers and province of courts and juries to administer rights and justice'."

Citing, with approval:

Monongahela Nav. Co. vs. *U. S.* (*supra*), 148 U. S. 312, 327; 13 Sup. Ct. 626; 37 L. Ed. 468; and

Reagan vs. *Trust Co.* (*supra*), 154 U. S. 409, 410; 14 Sup. Ct. 1059; 38 L. Ed. 1027.

(Decision turned, however, upon the point that there was no actual *taking* of Defendant's property, the surrender thereof having been voluntary.)

Smith vs. *Ames*, 169 U. S. 526; 18 Sup. Ct. 426; 42 L. Ed. 842; *United States* vs. *Rogers*, 257 Fed. Rep. 397, 399.

This case is one of a long list of many of like character which establish the law respecting confiscatory railroad rates, and uniformly grant to our courts their proper judicial function of determining what is, and what is not, just compensation.

> "While the rates for the transportation of persons and property within the limits of a State are primarily for its determination, the question whether they are so reasonably low as to deprive the carrier of its property without such compensation as the constitution secures, and therefore without due process of law, cannot be so conclusively determined by the legislature of the State, or by regulations adopted under its authority, that the matter cannot be the subject of judicial inquiry."

For a more recent case, in which Mr. Justice Colt decides that the reduction of railroad rates is a constitutional question under the fourteenth amendment, (requiring transportation of school children for half fare) see

Ahern vs. *Newton, &c., Ry. Co.* (1900), 105 F. 703, citing with approval *Reagan* vs. *Trust Co.* (*supra*).

(1) *And is unconstitutional even when made by a subordinate or interested tribunal.*

Western Union vs. *Myatt* (1899), 98 Fed. 335, 354; *Myer* vs. *Adams*, 63 App. Div. 540 affirmed in 169 N. Y. 605.

(Fixing rates by legislature, and determination of their equality by a legislative body called Court of visitation.)

"* * * Due process of law in judicial proceedings means a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. In legislative proceedings it required a conformity to the settled maxims of a free government, and an observance of constitutional restraints and requirements. In either case it means that there should be an omission to exercise substantial powers appertaining to the other department. Courts cannot legislate and pass judgment thereon. Legislative bodies or boards that are constituted as legislative agencies, cannot render judgment upon their legislative acts."

See also *Peirce* vs. *City of Bangor*, 74 A. 1039; 105 Me. 413; *National City Bank* vs. *United States*, 275 Fed. 855, 859; *Railway Steel Spring Company* vs. *Chicago, etc.*, 26 Fed. 690.

C. *Because said act is unjustly discriminatory as between persons and property owners of the same class.*

By an examination of the schedule of Sections complained of (*supra*), it will be seen that it un-

justly discriminates between (Sec. 11) the town of Scituate and any other town whose public buildings may be taken by the city, with respect to the right of such towns to surrender to, and be paid by, the city for the furniture and building equipments therein; and further, (Sec. 12), that it unjustly discriminates between (a) owners of mills taken under said act which are located in the town of Scituate within the red lines, and those whose mills, taken under said act, are located within the red lines but outside the town of Scituate; and between (b) owners of mills taken under said act which are located in the town of Scituate, but outside the red lines, and those whose mills, taken under said act, are located within the red lines but outside the town of Scituate, in both instances (a & b) in respect to

(1) the owner's right to surrender machinery and be paid therefor;

(2) the right to wait a reasonable time before moving machinery retained, or if required to be sooner moved, to be paid special damages for such earlier moving; and

(3) the right to be reimbursed for the reasonable expenses of moving to and setting up at, some new location within New England, machinery retained for use;

and between (c) owners of mills whose machinery, after the taking of the mills, will be moved to New York or some new location outside of New England, and those whose machinery, after the taking, will be moved to some new location within New England; and (Sec. 16) between (d) owners of busi-

ness located in Scituate or on the north branch of the Pawtuxet River, and the owners of business located elsewhere; and between (e) those whose business, thus located, was established prior to the passage of said act, and those whose business was not then established, but was established before the city took any action thereunder, or which might have been in good faith incorporated and nearly completed, although not completely "established" before the act was passed.

Assuming, but not conceding, for the purposes of this immediate argument, that it is competent for the legislature to provide that the City shall pay, as a part of its damage, the value of town furniture and equipment (Sec. 11) and mill machinery surrendered (Sec. 12) and useless to the City in its public project; the "special damages" for moving machinery retained, in advance of a "reasonable time" (Sec. 12); the expense of moving machinery retained and setting it up in a new location in New England (Sec. 12); and damage to business, arising directly or indirectly (Sec. 16), then we most strenuously contend that it is incompetent for the legislature empirically to select certain business to which such damages can be allowed, and certain locations, the cost for removal to which shall be given, and exclude others having no other distinction than such as the act designates. The 14th amendment forbids discrimination, and requires that all persons shall be treated alike, without undue discrimination. Why should it be permitted for a mill owner, whose machinery is to be moved to any point in New England, say,

the extreme northerly part of Maine, to be entitled to receive the cost of such removal, and another mill owner, who may desire and expect to remove to nearby New York, be prevented from being paid therefor?

Again, what is there about the attitude or position of a man whose business was established before the act became operative, that should entitle him to damages, whereas a person may have established his business after the act became operative in entire ignorance of it, or he may have been just ready to "establish", and have spent months of time and much money in preparation thereof, in entire ignorance of the proposition to pass this act? Why should such an one be excluded from compensation, and the other one have it? Is this equal protection of the laws? We insist that the legislative function in matters of this kind is to be just and not simply generous. That in that respect the law making power differs from a testator, and that if, as we contend is here done, the legislature has gone out of its way and provided a series of elements of damage which, so far as they go, are far beyond the legislative power to create, and are outside of just compensation, then they must not discriminate between the persons who shall enjoy this legislative largess. Were there any substantial differentiating quality between these classes of business, then the principle for which we contend might not apply. In a word, we insist that the distinction is an arbitrary one without logical difference, and that in so far as the act makes the distinction it is vicious and should be condemned.

In 8 Cyc. 159, under the subject "Equal protection of the laws", we find:

> "and by 'equal protection of the law' is meant equal security under them to everyone under similar terms, in his life, his liberty, his property, and in the pursuit of happiness, and exemption from any greater burdens and charges than such as are equally imposed upon all others under like circumstances."

See the numerous cases quoted in Note 9 in support of the foregoing distinction.

By favoring one, the act imposes upon others of the same class, a corresponding burden.

See *Merchant* vs. *Pennsylvania R. R. Co.,* 153 U. S. 380, at p. 390, citing with approval *Hayes* vs. *Missouri,* 120 U. S. 68:

> "The 14th amendment to the constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred, and in the liabilities imposed. As we said in *Barbier* vs. *Conolly,* 113 U. S. 27, speaking of the 14th amendment: 'class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment'."

In *Leeper* vs. *Texas*, 139 U. S. 462, the Supreme Court said:

> "Due process of law within the meaning of the amendment is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government."
>
> *United States* vs. *Armstrong*, 265 Fed. 683, 690; *United States* vs. *Yount, et al.*, 267 Fed. 861, 863.

See also cases collected in Taylor on Due Process of Law, pages 301, 304 and 305.

If the Court should find the act constitutional notwithstanding the objections raised in the preceding paragraphs, then plaintiffs in error, Joslin Manufacturing Co. and Theresa B. Joslin, as they are substantial taxpayers in the City of Providence, urge the unconstitutionality of the act,

D. Because the compensation required to be paid by the City of Providence, in excess of the just compensation guaranteed by the Constitution of the United States is arbitrary, confiscatory and should be condemned as depriving said plaintiffs in error of their property without due process of law.

The maximum compensation which the City of Providence ought to be required to pay in the exercise of its powers of eminent domain is that just compensation for private property taken for public use which is guaranteed under the Constitution. Had the act remained silent altogether upon the

subject of compensation, said compensation would then be computed in accordance with the rule laid down by the Court in *Taber* vs. *New York, Providence & Boston R. R. Co.*, 28 R. I. 269 at 283, wherein the Court in its decision says:

> "As has been seen, the act under which the location in the case now before us was made contained no provision for the assessment or set-off of benefits. The measure of damages, therefore, in this case, is the value of the land taken and such special damages, if any, as were caused to the remainder by the location of the railroad. For the land taken the owner must receive the just compensation provided by the constitution, that is, the value of the land taken. When we come to the second item, the damage to the remainder of the tract, then the constitutional provision has been satisfied, compensation has been made for the land taken; and the fact of damage to said remainder is to be established like any other fact, that is, by evidence. The special damages, if any, are to be shown, and also the special benefits, if any, and if the special damages exceed the special benefits, then the excess is the amount of the damage to such remainder, and is to be added to the value of the land taken to ascertain the whole damage. If, however, the special benefits to said remainder equal or exceed the special damages to the same, then said remainder has not been damaged."

Yet, by a review of the act itself, it appears to what a tremendous extent the legislature has obliged the City of Providence to go, and when the enormity of the enterprise is considered, and the

huge sums involved for these added elements of compensation are taken into account, the payment of the price is not taxation, but confiscation.

In *Reagan* vs. *Trust Co.*, 154 U. S. 409, 410, 14 Sup. Ct. 1059, 38 L. Ed. 1027 (*supra*), the court observed:

> 'If the State were to seek to acquire the title to these roads under its power of eminent domain, is there any doubt that constitutional provisions would require the payment to the corporation of just compensation; *that compensation being the value of the property as it stood in the markets of the world,* and not as prescribed by an act of the legislature?' * * *"

All that is required is the payment of the value of the property taken, as it stood in the markets of the world. But here is an outline of the burdens imposed without any useful, adequate or corresponding return:

Payment for
(1) land, waters, waterways and works not taken;
(2) furniture in public buildings taken which is surrendered;
(3) machinery in mills taken which is surrendered;
(4) moving and setting up machinery retained;
(5) special damage for moving machinery retained, in advance of a reasonable time;
(6) additional police protection for towns;

(7) decrease in value of lands contiguous to lands taken;

(8) damage to business;

(9) wages of employees of mills taken for not to exceed six months.

Taxes are enforced contributions levied for public needs, and are the property of the citizens demanded and taken by the government to enable it to discharge its functions, and the needs of the government constitute both the occasion and the limitation of the taxing power.

See *Madary* vs. *City of Fresno*, 128 Pac. 340, 343; 20 Cal. App. 91.

"'Taxation' is the absolute conversion of private property for public use, and its validity rests on the use." *State ex rel. Consolidated Stone Co.* vs. *Houser*, 104, N. W. 77-79; 125 Wis. 256.

These plaintiffs in error therefore contend that such enlargements upon the constitutional obligations of the city as condemnor for its water supply, amount to a gross abuse of the taxing power and that such extraordinary expenditure brings the case within the spirit, if not within the letter, of that long line of cases which hold it to be unconstitutional to use public money for private enterprise, or to levy a tax or impose a burden for that purpose. The leading case is

Savings & Loan Assoc. vs. *Topeka* (1875), 20 Wall. 655, cited with approval in *Jones* vs. *City of Portland*, 245 United States, p. 221.

"The act authorizes the town and other municipalities to which it applies, by issuing bonds or loaning their credit to take the property of the citizen under the guise of taxation to pay these bonds, and use it in aid of the enterprises of others which are not of a public character, thus perverting the right of taxation, which can only be exercised for a public use, to the aid of individual interests and personal purposes of profit and gain.

The proposition as thus broadly stated is not new, nor is the question which it raises difficult of solution.

If these municipal corporations, which are in fact subdivisions of the State, and which for many reasons are vested with *quasi* legislative powers, have a fund or other property out of which they can pay the debts which they contract, without resort to taxation it may be within the power of the Legislature of the State to authorize them to use it in aid of projects strictly private or personal, but which would in a secondary manner contribute to the public good; or where there is property or money vested in a corporation of the kind for a particular use, as public worship or charity, the Legislature may pass laws authorizing them to make contracts in reference to this property, and incur debts payable from that source.

But such instances are few and exceptional, and the proposition is a very broad one, that debts contracted by municipal corporations must be paid, if paid at all, out of taxes which they may lawfully levy, and that all contracts creating debts to be paid in future, not limited

to payment from some other source, imply an obligation to pay by taxation.

It follows that in this class of cases the right to contract must be limited by the right to tax, and if in the given case no tax can lawfully be levied to pay the debt, the contract itself is void for want of authority to make it.

If this were not so, these corporations could make valid promises, which they have no means of fulfilling, and on which even the Legislature that created them can confer no such power. The validity of a contract which can only be fulfilled by a resort to taxation, depends on the power to levy the tax for that purpose."

* * *

"To lay, with one hand, the power of the government on the property of the citizens, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery, because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms."

IV

Said Act is Unconstitutional and Void, in That it Permits the City of Providence to Take Possession and Use of the Property of Plaintiffs in Error, and to Rent, Sell and Dispose of the Same Without Offering Any Compensation Therefor or Having Any Compensation Therefor Permanently or Tentatively Determined.

Under Section 4 of the Act the Water Board is empowered to purchase such lands, etc., "as are

necessary or desirable for such water supply," provided, however, "that said board shall not make any contract for any such purchase until the city council of said city shall have first made due provision for supplying the necessary funds therefor."

Under Section 21 of the act the City is permitted to lease any of the lands acquired or purchased by condemnation which are not required for its reservoir or other works, but are held to protect the water from pollution, provided that such leases may be terminated summarily in case the same shall be necessary.

Section 23 of the Act provides in detail as to the ways and methods to be followed in acquiring lands within the area by condemnation, and provides for the making of a plat of all lands to be taken with a description thereof containing the names of the owners; and that, upon the filing of the statement required by said section, together with a copy of said plat, in the office of the Town or City Clerk in which such lands lie, the title of such land or lands, etc., "shall vest in the City of Providence in fee simple", unless a less estate is specified. The Act further provides that the city shall not take actual possession of any such lands, etc., until after the expiration of one year from the date of filing such statement, except in the cases of highways, possession of which may be taken at the expiration of three months from such date. The section then provides that notice of such taking shall be served upon the owners and persons interested in such lands and if any such owners or persons shall agree with said city upon the

price same is to be paid forthwith by said City of Providence. If an owner does not agree with the city upon a price for his property he may within one year after receiving personal notice or within two years if he has had no personal notice apply by petition to the Superior Court for an assessment of damages by a jury. There is in a similar way an alternative method for assessment whereby the owner may apply within such time to the Superior Court for the assessment of damages by a Commission to be appointed by the Court. Upon the final determination of the amount of damages awarded in either of the manners aforesaid "execution shall issue in favor of the petitioner and against said city therefor".

Under Section 26 of the Act the City of Providence is authorized and empowered from time to time to hire the sums of money necessary to defray the costs of the undertaking comprehended within the Act, including the payment for lands acquired either by purchase or condemnation, and to issue "its notes and bonds or either therefor". The city council is authorized to supervise the issue of bonds and to fix the amount of same. The city is required to appropriate annually a sum sufficient to cover the interest on the bonds and also to maintain a sinking fund for the redemption thereof. It is also provided that the net proceeds from the sale or lease of any buildings or lands authorized thereunder to be sold or leased shall be placed in said sinking fund.

No provision exists in the act for a fair appraisement of damages before the taking, or of notice of any kind to the owner prior to such taking.

A.

IT IS THE CONSTITUTIONAL RIGHT OF THE LANDOWNER THAT THERE SHALL BE A PRIOR DETERMINATION BY AN IMPARTIAL APPRAISAL OF THE VALUE OF HIS LAND BEFORE THE SAME MAY BE TAKEN UNDER EMINENT DOMAIN, AND THAT THIS DETERMINATION OF VALUE SHALL BE THE AMOUNT WHICH THE LANDOWNER MAY EXPECT TO RECEIVE OR HAVE ADEQUATELY SECURED TO HIM BEFORE ANY TAKING CAN BECOME EFFECTUAL. THE LANDOWNER SHOULD NOT BE REQUIRED TO INITIATE THE PROCEEDINGS TO BRING ABOUT SUCH APPRAISAL.

That private property taken for public uses shall be paid for might well be called axiomatic. The sovereign right to seize the land or other estate of the individual in response to public necessity exists independent of all constitutions. The duty of paying fairly for that which is so taken is expressed in the Constitution of the United States and in the Constitutions of nearly all of the States.

1 *Lewis, Eminent Domain,* 3rd Ed., §§ 16-61 incl.

The taking of property by right of eminent domain without making reasonable, certain and adequate provision for compensation constitutes a taking without due process of law or conformably to the laws.

Chicago, &c., R. R. Co. vs. *Chicago,* 166 U. S. 226.

Plaintiffs in error submit the following proposition: It is their inalienable right that their prop-

erty shall not be taken for public uses, unless there shall have been provided and set in motion the means for the impartial ascertainment of its fair value, with adequate security or pledge to pay, with due provision for the same, to be determined before any taking can become effective or any rights or privileges incident to the ultimate public uses may be exercised under such taking.

This proposition embraces a matter that is essentially a matter of personal right, guaranteed by the Constitution of the United States to be inviolate, and protected by said Constitution of the United States in the Fourteenth Amendment thereto.

Payment of compensation or the tender thereof is a specific precedent condition required by the Constitutions of nearly twenty or more of the States. In Rhode Island all such proceedings have not been purely judicial—the more important (with a few exceptions) have been, and the rest have had the attributes of judicial proceedings; they have been impartial, and the owner of land could be assured that whether or no he became a party, formally or otherwise, the fair value of his land would be paid to him.

It is stated in 2 *Lewis on Eminent Domain,* 3rd Ed., § 678, that "as an original question, it seems clear that the proper interpretation of the constitution requires that the owner should receive his just compensation before entry upon his property. When an individual is ousted from possession under a claim of right, his property is taken from him, and, if he has not been paid an equivalent in

money, or, if adequate provision be not made for such payment, it is taken from him without compensation. Some of the cases so hold. But in most States it is held that the making of compensation need not precede an entry upon the property, provided some definite provision is made whereby the owner will certainly obtain compensation".

See *Backus* vs. *Fort Street Union Depot Co.*, 169 U. S. 557, where the court says, page 569: "All that is essential is that in some appropriate way, before some properly constituted tribunal, inquiry *shall* be made as to the amount of compensation, and when this has been provided there is that due process of law which is required by the Federal Constitution."

The above statement clearly means that a determination is a requisite and necessary part of any condemnation, and applied in conjunction with the doctrine of *Kennedy* vs. *Indianapolis*, 103 U. S. 599, 604, that the owner's title is not divested until payment is made, it follows that no condemnation can become effective without requiring an ascertainment of compensation as a part of the proceedings.

It appears that Mississippi is one of those numerous States whose constitutions specifically require payment prior to taking by eminent domain, for its Constitution (1890), Art. 3, § 17, reads as follows:

> "Private property shall not be taken or damaged for public use except upon due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law;

and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question, and as such determined without regard to legislative assertion that the use is public."

In 1868, and thereafter, until the subsequent revision above noted, the provision was as follows:

> Art 1, § 10. "Private property shall not be taken for public use except upon due compensation first made to the owner or owners thereof in a manner to be provided by law."

The rights of the owner whose land is taken away from him are not, however, by the Courts in Mississippi, in this behalf considered established merely by reason of the rather explicit constitutional provision for their protection.

The words of the Court in *Levee Commrs.* vs. *Dancy*, 65 Miss. 335, 341 (1887), are appropriate:

> "The owner may lose his title by lapse of time long enough to bar its assertion, but cannot be compensated for his property by an opportunity to litigate to secure 'due compensation' for it, however long the time allowed him for that."
>
> "Obtaining by grant from the owner, or by adverse possession, long enough to bar his claim to the property, or condemning and paying for it, are the only modes of obtaining private property for public use in this State; and no act which devolves on the owner the duty of initiating proceedings for compensation for his property, as the condition of his obtaining it is allowable. He cannot be re-

quired to become an actor under the penalty of losing his property and 'due compensation' for it, if he shall not. He may enjoy his own, secure under constitutional guaranty, until an inquest by public authority determines that it is required for public use, and fixes the price to be paid him for the sale of it, and this price must be paid or tendered before his right can be divested, and a right to ask for compensation in three months or three years is not a valid substitute for the constitutional right to 'due compensation first being made'."

The State of Washington by its Constitution requires prepayment, or prior deposit in court of the land's value. Certain of the decisions in this State are, however, of interest.

In *Askam* vs. *King County*, 9 Wash. 1 (1894), holding the "drainage law" to be unconstitutional, the court says, p. 2:

> "Under the provisions of such law there is no pretense of an attempt to have the damages incident to the taking of private property assessed and compensated for in the first instance, and, if the property owner does not appear and himself take the initiative, the law provides that his property may be taken without there having been an assessment of damages or the payment of any compensation whatever.
>
> To give effect to a law of this kind would be to substantially overthrow the provision of our constitution which provides, in § 16 of Art. I, that no private property shall be taken or damaged without just compensation having been first made or paid into court for the

owner. It is true that, if the owner comes into court and files his claim for damages, the law provides machinery for having it ascertained and paid, but, if for any reason he does not so appear and file his claim, the property is to be taken without this provision of the constitution having been in any manner complied with.

If the law had provided for even an *ex parte* assessment of damages, and that such assessment should be filed, and unless objected to, confirmed, it might be possible to sustain it on the ground that such assessment of damages and its filing in a proceeding to which the property owner had been made a party by proper notice was in the nature of a proffer to him of just compensation, and if he did not appear and object thereto such failure on his part might be taken to be a waiver of the right to have his damages assessed by a jury."

To the same effect are:

Snohomish County vs. *Hayward,* 11 Wash. 429, 431 (1895).

Peterson vs. *Smith,* 6 Wash. 163 (1893).

approved in

Kincaid vs. *Seattle,* 74 Wash. 617, 622 (1913).

The constitutional provision in Wisconsin reads as follows, Art. 1, Sec. 13:

"The property of no person shall be taken for public use without just compensation therefor."

The Supreme Court of that State in the case of *Powers* vs. *Bears,* 12 Wis. 213 (1860), has declared,

p. 221, that "before the public can, against the will of the owner, acquire the right to enter upon and permanently occupy his land, which may be needed for public uses", the following must be done:

> "1. The value of the property to be taken must be ascertained by some legal and proper proceeding, and be paid; or,
>
> "2. If the value thus ascertained be not paid to, or received by, the owner, an adequate and safe fund must be provided, from which he may at some future time be compensated.
>
> "These, it seems to us, are the results of those cases and they are such as we should be unwilling to depart from."

The early decisions followed and approved by the above case are:

> *Norton* vs. *Peck*, 3 Wis. 714, (628 reprinted.).
>
> *Shepardson* vs. *Mil. & Beloit R. R. Co.*, 6 Wis. 605, 613.
>
> *Wisconsin Tel. Co.* vs. *R. R. Com.*, 162 Wis. 383 (1916).

Certain other States have constitutional provisions similar to that in Rhode Island, and prohibit taking without just compensation. In North Carolina there is no provision whatever. In New Hampshire, "no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people". In Vermont it is determined "That private property ought to be subservient to public uses, when necessity requires it; nevertheless,

whenever any person's property is taken for the use of the public, the owner ought to receive an equivalent in money". And in Massachusetts, "whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor".

The great body of the States, therefore, contain constitutional prohibitions against the taking of land without just compensation. Nearly half of this number expressly require prepayment, in the remainder no specific provision as to the time or manner of compensation is literally expressed.

It will generally be found, however, that the prevailing practice, following constitutional requirements such as these, includes an assessment of damage or an appraisement of value, by methods presumed to be fair and just, during the proceedings for condemnation; and the initial proceedings are intended to be, and in the absence of committed error, are, complete as to the taking and providing means for payment.

It is not right or proper that the owner of land should be required himself to incur and bear the *whole* risk and burden of obtaining compensation for the property of which he has been unwillingly deprived.

Hitherto he has considered himself sufficiently protected in his rights in such behalf, and with the exception of some few items of strange legislation, of which the act now in question is one, he has had such assurance.

The right denied to the owner by this act is real, and valuable, and to take a person's land without allowing him the benefit of such right, is contrary to the Constitution of the United States. It is taking his property without due process of law and by means and methods not conformable to the laws.

The shield of the Constitution should continue to preserve the entire body of rights hitherto established and recognized, growing out of accepted usage and custom, and founded upon natural justice, and the right of a person to know that fair payment for his seized property will inevitably come to him is one of them.

B.

SAID ACT IS OBNOXIOUS IN THAT IT PERMITS THE USE, LEASE, SALE AND DISPOSITION OF THE PROPERTY OF PLAINTIFFS IN ERROR WITHOUT ANY COMPENSATION BEING OFFERED THEREFOR OR BEING PERMANENTLY OR TENTATIVELY DETERMINED.

1. The assertion in the act that a title in fee simple (or other estate) shall be vested in the City of Providence upon the filing of the plat and statement is inconsistent with the owners constitutional rights.

2. Under the terms of the act the condemning party may, after the expiration of one year from the filing of statement and plat, oust the owner, and then may lease the same property to some other person or corporation, to occupy and use, and for the same uses that have hitherto been made of such property. (Secs. 21 and 23.)

Certainly an entry and ouster of an owner for the ostensible public purposes, followed by a lease of the same property to the owner's business competitor or other person, would be objectionable and unjust.

3. Such provision in said act is a further admission that the property purported to be taken is not wholly and presently necessary for public purposes, and that the same or parts of the same may be sold or leased before being paid for, or before the amount of compensation shall be determined, is a taking of land for private purposes without compensation and without any color of right.

It should be observed that the act makes more particular provision for compensation to the owner of land in the case of purchase than when the land is condemned.

Under Section 4 the water board is limited in its contracts for the purchase of land until the city council shall have first made due provision for supplying the necessary funds therefor.

It does not appear that due provision for supplying the necessary funds must exist prior to the taking of land by condemnation unless the same can be inferred from the authority granted to the City under Section 26 "to hire any and all sums of money necessary, and to exclusively use the same to defray the costs of securing such water supply, including all costs of acquiring such lands * * *".

The land owner who executes his voluntary deed is paid on delivery; and no contract for such deed can properly be made until the required funds are practically in hand, ready to be paid out by the City.

The owner of land which is taken has no notion what his compensation is to be; if he would be paid, after bringing his action he has no assurance that the funds are ready and available for the settlement of his claim, inasmuch as the matter is dependent, for immediate resources at least, upon the borrowing power of the City of Providence and on the willingness to lend from the various sources of money supply, for an execution means little unless it be paid; and it is submitted that the authority to borrow from time to time is no more an equivalent to the making of a due provision for payment than is an execution against a defendant temporarily embarrassed, but perhaps ultimately solvent.

In taking a man's property from him against his will, it is required, not that he will in all probability ultimately receive his compensation, but that he shall *certainly* receive it *promptly;* taking under other conditions than these cannot be by due process of law.

It is certainly clear that it was the intent of the act to divest the title from the owner and vest it in the city upon the filing of the statement and plat, and that the year following was merely a year of grace wherein the owner might readjust his affairs, no matter whether he should have been paid or not.

It all amounts to this: The owner who agrees with the city receives something; he who does not is granted an expectation of some time obtaining an execution which the law will require to be paid if such payment is possible.

The taker thus has this unfair advantage in bargaining. The owner must accept what the taker has a mind to pay, or he must count on the possibility of compelling the payment of fair compensation which may not be determined until long after the time when, by the terms of the act, he has been divested of his estate, and provision for which has not been made other than by the authorization for some future loan.

Had the act provided for the ascertainment of fair compensation as a corollary of the initial proceedings for condemnation, the owner would not be subject to the present dilemma. He would know that due provision would be made for the agreed price or for a fair price before he could in any manner be disturbed, or any adverse claim be set up against his title. There is no suggestion in the act whatever that the City of Providence is required to appropriate money to carry out the purposes of the act, except in so far as the same may be inferred from the provision that an execution may issue, and that interest for bonds is required, and sinking fund maintained. The board may not contract to purchase land unless the funds are provided, but the city is allowed to take a vested title in fee simple without any requirement of an appropriation.

It is said in *Talbot* vs. *Hudson*, 16 Gray 417, at p. 432:

> "The presumption of law is, that the State will keep its faith inviolate, and honestly fulfill all its obligations. 3 Bl. Com. 255, 4 Bl. Com. 33. Broom's Max. (3rd Ed.) 51. *Hill* vs. *United States*, 9 How. 386".

This presumption may well apply to the sovereign state, which, it is assumed, will do no wrong and against which no suit may be brought by the citizen; but can this presumption apply to a certain municipality, and if it can be so applied, must it not equally be applied to any other?

It is easily conceivable that situations might arise making it slow and difficult for an individual to obtain any actual compensation whatever, although he would be entitled to it promptly and certainly.

The case of *Caldwell* vs. *Highway Commrs.*, 249 Ill. 366 (1911), p. 373, is in point.

The court said:

> "Courts have held that where no time is specified for payment and the State undertakes the payment of compensation, it is not necessary that the payment should precede the use of the property, and perhaps that doctrine is sustainable on the ground that the public faith is of such a character and so pledged to the performance of obligations of the State as to amount to payment. There is no good ground for extending such a rule to towns and local municipalities, for whose obligations the State assumes no liability. As a matter of justice, an owner should not be required to resort to legal proceedings to secure compensation for property which the constitution guarantees to him as a condition precedent to the right to take his property, and the only method of enforcing orders such as were tendered to the complainants would be by a resort to such proceedings. In a condemnation pro-

ceeding the owner cannot be made to pay costs, which would reduce by their amount compensation for his land, and the same rule ought to apply as to giving him something as compensation which he may be compelled to collect by bringing a suit. A just rule is stated in 2 Kent's Commentaries (339, note f): 'The settled and fundamental doctrine is that government has no right to take private property for public purposes without giving a just compensation, and it seems to be necessarily implied that the indemnity should, in cases which will admit of it, be previously and equitably ascertained and be ready for reception concurrently, in point of time, with the actual exercise of the right of eminent domain'. Title does not pass until the compensation has been paid, and an injunction will lie to prevent a seizure where compensation has not been paid or tendered as the law requires. (Elliott on Roads and Streets, secs. 238-242.) The decisions of this court are in harmony with that doctrine."

The point decided in the above case, *Caldwell* vs. *Commrs.*, was that as compensation for land taken the town orders payable out of a tax to be levied were not equivalent to money. The same reason could apply as well to a mode of payment to be obtained by means of or through an execution against a municipality. If a town or city will not, or cannot pay, it is a rather particular statutory procedure that must be taken to compel such payment, which in many cases may be reasonably certain but is by no means "prompt".

It is therefore submitted that in no event can

plaintiffs in error be deprived of the possession, title or use of their property until the fair value thereof is ready to be paid therefor upon demand, or upon tender at the time of such taking.

As payment *must* be made before title can pass, or the owner be ousted, it follows that it *must* be tendered, and to be tendered, the amount thereof *must* be previously determined.

The act is fatally defective, therefore, for assuming to divest title and give to the taker the possession without *requiring* in any way a prior determination of fair value and a tender or payment thereof concurrent with such vesting of title or taking of possession and ouster.

In its lowest terms, the act does not *require* payment of compensation, and it is therefore void.

V

Under Said Act Plaintiffs in Error and Other Owners Are Deprived of Their Property Without Due Process of Law, Without Remedy by Recourse to the Laws, Conformably to the Laws, or by the Law of the Land, in That Their Property is Allowed to be Taken Under Color of Eminent Domain by the City of Providence Acting Under Said Act, When the Questions of the Necessity of the Taking as a Whole or of the Taking of the Various Parcels which Are Taken Have Not Been Decided by the Legislature Itself, but Have Been Relegated to the City of Providence to Decide Ex Parte, Without Appeal and Without an Opportunity to Have Said Questions Heard and Decided by Any Impartial Tribunal.

SEC. 1 of the act in establishing the water supply board for the city of Providence expressly stipulates that said board shall consist of the same persons who at the time comprised the committee on water supply for the said city.

SEC. 3 empowers this board to investigate and determine the desirability of the north branch of the Pawtuxet river and its water shed as a source for a water supply for said city and other territories, and if that source is approved the board is required to make a plan locating the reservoir and its connections.

SEC. 4 provides that after the plan is made the board is empowered to purchase land, waters, flowage rights and privileges "as are necessary or desirable for such water supply," but the board is not allowed to make any such purchases of property until the necessary funds are provided by the city council of said city.

Under Sec. 5 of the act the city of Providence is authorized to acquire by condemnation any lands included within the designated area which the city council deems necessary for the location of reservoirs, and also any lands within said area which said city council deems necessary for ancillary purposes, *and also any lands necessary for the construction of an aqueduct,* the right being given to the city to take all such lands in fee simple.

SEC. 6 authorizes the city to acquire absolutely by condemnation the waters of said branch of said river and its tributaries on any part or parts thereof

included within said area shown within red lines on said plat, and any water rights, flowage rights, or privileges appurtenant to or in connection with said area, or any part thereof, and any waters flowing into the reservoirs, and to appropriate and divert the same for such water supply.

SEC. 8 provides that within lands included in the designated area, which are acquired or taken by the city for water supply purposes all public lighting rights or easements in any part of said lands shall terminate upon such taking. And also that the city may acquire by purchase or condemnation any lands the city council deems necessary to lay out and build new highways or to relocate existing highways, or existing railroad lines.

By Sec. 21 the city is also authorized to lease lands acquired by purchase or condemnation under the act not required for the reservoir or other waters, but are "held to preserve the waters thereof and the waters of said river branch and its tributaries from pollution."

A.

THE FUNDAMENTAL PRINCIPLES WHICH HAVE HITHERTO BEEN FOUND NECESSARY TO GIVE COMPLETE AND SATISFACTORY PROTECTION TO THE LAND OWNER WHEN HIS PROPERTY IS TO BE TAKEN FROM HIM BY SOME EXERCISE OF THE SOVEREIGN POWER ARE AN INSEPARABLE PART OF THE BODY OF OUR CONSTITUTION AND ESTABLISHED LAWS. THEY ARE VITAL TO HIS RIGHTS,—THEY ARE HIS RIGHTS.

Such real, substantial rights must be deemed to have survived and have been preserved, and the taking of land without recognition of these rights is depriving a man of his property without due process of law, and by means and methods not conformable to the laws or to the law of the land.

In *Weimer* vs. *Bunbury,* 30 Mich. 201, one of our greatest constitutional authorities had declared, pp. 213, 214:

> "There is nothing technical, or, as we think, obscure, in the requirement that process which divests property shall be due process of law. The Constitution makes no attempt to define such process, but assumes that custom and law have already settled what it is. Even in judicial proceedings we do not ascertain from the Constitution what is lawful process, but we test their action by principles which were before the Constitution, and the *benefit of which we assume that the Constitution was intended to perpetuate.* If there existed, before that instrument was adopted, well known administrative proceedings which, having their origin in a legislative conviction of their necessity, had been sanctioned by long and general acceptance, we are no more at liberty to infer an intent in the people to prohibit them by implication from any general language, than we should be to infer an intent to abridge the judicial authority by the use of similar words. The truth is, the bills of rights in the American Constitutions have not been drafted for the introduction of new law, but to secure old principles against abrogation or violation. They are conservatory instruments rather

than reformatory; and they assume that the existing principles of the common law are ample for the protection of individual rights, when once incorporated in the fundamental law, and thus secured against violation.

We are therefore, of necessity, driven to an examination of the previous condition of things, if we would understand the meaning of due process of law, as the Constitution employs the term. Nothing previously in use, regarded as necessary in government and sanctioned by usage, can be looked upon as condemned by it. Administrative process of the customary sort is as much due process of law as judicial process."

"No change in procedure, either under federal or state law, must work a denial of fundamental rights."

> *Taylor, Due Proces of Law,* § 297, citing, *inter alia, C. B. & Q. R. R. Co.* vs. *Chicago,* 166 U. S. 226.

It is submitted that the rights of the landowner are property rights that are protected and preserved by the Constitution of the United States, and that a denial of such rights is a denial of the equal protection of the laws, and the taking of his property without regard to such rights is a taking without due process of law, and contrary to the provisions of Article XIV of the Amendments to the Constitution of the United States.

B.

WHILE THE POWER OF EMINENT DOMAIN IS AN ATTRIBUTE OF SOVEREIGNTY, ITS EXERCISE CAN ONLY BE

CONSTITUTIONALLY JUSTIFIED WHEN THE USE IS A PUBLIC ONE AND THE TAKING IS NECESSARY FOR THE REASONABLE EXERCISE OF THE USE.

The Fourteenth Amendment to the Constitution of the United States had its source in Article 39 of the Magna Charta—the great declaration concerning freemen's rights. This Article is the most important one in the Charter, for it contains an absolute guarantee of personl liberty and insures absolute protection to the citizen in the enjoyment of his property and privileges.

While the right to take private property is admittedly an attribute of sovereignty, constitutional limitations on the exercise of this right demand that the purpose for which the appropriation is made must be a public purpose and the private property must be needed for the public object.

Matter of Tuthill, 163 N. Y., 133, 138. .. *Water Commissioners* vs. *Manchester*, 87 Conn. 193 affirmed in 241 U. S. 649.

If the taking be in excess of what is necessary for the use, then the use is not a public one and the taking is invalid, because the moment the taking goes beyond what is necessary in the particular case it ceases to be constitutionally justifiable. In such a case the taking cannot in any just sense be said to be for a public purpose, and giving all respect to the legislative determination, property obviously not necessary for the object involved is, so far as the owner is concerned, merely confiscated.

Kane vs. *Mayor and City Council of the City of Baltimore*, 15 Md., 240.

In said case, under an act entitled "An Act for Supplying the City of Baltimore with Pure Water," the city caused part of land constituting the bed of a stream to be condemned, and compensation to be paid therefor. Plaintiff had a mill on a portion of the stream. Claiming to proceed under authority of the condemnation act, defendants took possession of the mill and discharged the water from the mill dam so that the mill could no longer be used for manufacture of flour. Plaintiff asked for an injunction on the ground that the only use he made of the water was to cause it to pass over his water wheel and that such use was made without the slightest impairment of the quantity of the water or pollution of its quality. Among objections urged in argument by defendants was that the legislature having determined the necessity, the city council was the sole judge of what property should be appropriated and there was no right in the court to pass upon the matter.

In granting the injunction the court said that the defendants were entitled to take only for the purpose mentioned in the act, namely, for supplying the city with pure water; that since the use of the water by plaintiff in connection with his mill did not interfere with the introduction of pure water into the city, the latter had no right to take his property and the legislature had no power to bestow any such right upon them. Referring to the authority given the city by the legislature to acquire title by condemnation for the "purpose of conveying water into said city, for the use of said city, and for the health and convenience of the in-

habitants thereof," the court said, at bottom of page 249:

> "Under this privilege the city can acquire a right to the use of the water in perpetuity but the *use* to which it is to be applied must be the one specified. In our opinion it is not competent for the legislature to confer on the City of Baltimore, or other corporation, the power to take *private* property for any use but a *public* one; and the *particular* public use in this case, is described fully in the Act of Assembly, and is observed in the finding of the jury, *'the conveying water into said city'*. The legislature could not confer on the city a larger power than it possessed * * * * * * * We think the complainant has the right to use the water in the manner it has been customary to use it at his mill, so far as that use may not interfere with the use of the same by the Mayor and City Council for supplying the city with pure water".

And so also a statute authorizing the taking of an entire lot through which a street was laid out has been held unconstitutional as taking private property unnecessary for public use.

> *Matter of Albany Street,* 11 Wend, (N. Y.) 149.

C.

THE ATTEMPT OF THE LEGISLATURE TO MAKE THE CITY COUNCIL THE SOLE JUDGE OF THE NECESSITY FOR THE TAKING OF CERTAIN PROPERTY AND THE EXTENT OF SUCH TAKING WITHOUT RIGHT OF THE LANDOWNER

TO BE HEARD TO SAY THAT THE PUBLIC USE MAY BE FULLY SUBSERVED WITHOUT TAKING HIS PROPERTY OR SOME PART THEREOF, CONTRAVENES ARTICLE XIV OF AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

In discussing this subject, we do not contend that the expediency of taking land by right of eminent domain for a public use is other than a political or legislative question and not a judicial one, nor do we desire to be considered as urging that if the land sought to be taken is reasonably necessary for the use in question, a landowner whose land is so taken may properly claim that other lands or property might have been obtained instead of the objector's. But conceding the public character of the use to have been properly declared, i. e., a municipal water supply, and the propriety of the reasonable exercise of the power of eminent doman for that purpose to be admitted, since the legislature has not determined the particular property to be taken, but delegated to the water supply board and the city council the determination of the expediency of employing eminent domain and the extent to which it shall be employed, the matter thus becomes judicial and due process of law is not satisfied unless the landowner be given opportunity to be heard relative to the necessity for taking the property.

(a) THE LEGISLATURE HAS NOT DETERMINED THE NECESSITY FOR TAKING SPECIFIC PROPERTY.

Necessity is sometimes referred to in two aspects:

the appropriation of the particular property of a certain individual and the extent to which it shall be taken; and the public character of the use.

While the legislature may itself decide both these questions, that is, it may determine that a certain public use justifies the employment of eminent domain and may describe the particular property to be taken, it may often happen that the legislature does not exercise this right but delegates the duty elsewhere.

The legislature in the act under review has nowhere specifically designated the land to be taken. In using the word "land" we use it in the sense in which it is defined in Section 22 of the act which, in substance, states that it shall include every interest in lands and waters. The water supply board has the duty to determine whether the power of eminent domain shall be exercised and the city council is given the power to condemn not only what land the *water supply board determines upon* within the area enclosed within the red lines or which the city deems necessary, but also any lands *outside* the area necessary for aqueducts and highways (Section 5) and any water or flowage rights or privileges *appurtenant to* or *connected with* the said area or any part of it and any waters flowing into the reservoirs (Section 6). The intent to permit a taking outside the red lines is further clearly evidenced in the opening sentence of Section 11 of the act. Even if the taking had been limited by the legislature to a maximum within the vast area enclosed by the red line, this would no more be a specific designation than would the drawing of a red line around the

entire state and authorizing a taking anywhere within the enclosure.

(b) THE ATTEMPT TO VEST IN THE CITY COUNCIL THE RIGHT TO MAKE FINAL DECISION AS TO THE NECESSITY FOR TAKING PRIVATE PROPERTY AND THE EXTENT OF THE TAKING, UPON ITS EX PARTE JUDGMENT, IS NOT DUE PROCESS OF LAW.

The sweeping and absolute nature of the authority vested by the act in the water supply board and the city council in the matter of determining the propriety and the exercise of the power of eminent domain, and the utter absence of any provision for an impartial determination of the necessity and reasonableness of the exercise of the power is evident from the following:

Under Section 3 of the act no provision is made for determining the question as to whether a part of the north branch of the Pawtuxet river and the water shed tributary thereto is the most available and desirable source for said water supply, except *ex parte* by said water board without appeal therefrom or any opportunity for the decision of said question by any impartial tribunal.

Under Section 5 of the act the final decision as to the necessity for the taking of private property and what shall be taken in each case is left to the city council for its *ex parte* decision without appeal therefrom or without any opportunity for an impartial consideration and determination thereof.

Under Section 6 of the act the question of the necessity for said city to take such waters, water and flowage rights or privileges and waters flowing

into such reservoir or reservoirs and to hold the the same, is left absolutely to the *ex parte* determination of the city of Providence, without appeal from said decision or any opportunity for submitting the decision of such question to any impartial tribunal, other than as to the matter of the regulation of the flow of waters from the containing reservoirs.

Under Section 8 of the act there is a failure to provide for the decision of the question of the public necessity for such new highways or relocation of parts of existing highways, except by an *ex parte* decision of the city council without appeal therefrom or the decision of such question by an impartial tribunal, although there is a provision for the submission and approval of the plans of new roads to the board of state highways or to the town council of said Scituate.

Under Section 21 there is no provision for a determination by an impartial tribunal as to the reasonableness of the taking of said lands, and the purpose for which the land is held is left to the *ex parte* decision of said city without appeal therefrom to any disinterested trribunal.

Under Section 23 of the act no way is provided for any appeal from the action of the city council in taking, or any appeal from the resolution of the city council to take, any land or lands or any estates, easements, rights or interests in any land or lands, or any waters or water rights or privileges for any such purpose or purposes under said act, or any determination of the public necessity of such

taking, except by *ex parte* vote of such city council and without the opportunity for such question to be passed on in any way by any disinterested tribunal.

The delegation of these matters to the municipal tribunal causes them to become judicial and notice and hearing become necessary for due process of law.

McGehee on Due Process of Law, pp. 296-7.

Mr. McGehee, *supra,* at said pages 296-297 says:

> "The duty of deciding on the public character of the use, the expediency of employing eminent domain and the extent to which it shall be employed is, as has been seen for the legislature, unless the constitution provides otherwise, with a supervisory right in the courts to see that the legislature does not exceed its constitutional functions. With regard to these questions, action by the legislature, unless wholly arbitrary and unreasonable is, in itself, due process of law, and, where the legislature chooses to act, the owner of property condemned cannot complain of the want of a hearing on these matters. *But the legislature may choose to delegate the decision of some of these questions to tribunals, and when the matter is so delegated it becomes judicial and due process of law is not satisfied but by notice and a hearing.*"

The following authorities hold that the landowner is lawfully entitled to a hearing by an impartial tribunal relative to the necessity for taking his property:

In *Stearns et al.* vs. *The City of Barre,* 73 Vt., 281, 50 Atl. Rep., 1086, the city council condemned

property of the petitioners, purporting to act under legislative authority authorizing the city council to provide a water supply. The act provided for an appeal to the county court from the decision of the city council in the matter of damages in connection with the property taken, but did not permit an appeal in respect of any other matter. The petitioners claimed that the provision leaving the question of necessity to the determination of the officials of the municipality taking the property, without allowing an appeal rendered the act unconstitutional, but the petitionee insisted that it was clearly within the power of the legislature to leave the matter to the final determination of its city council and that the action of the legislature in exercising the right of eminent domain was conclusive upon the courts as regards the question of necessity; that instead of exercising this right directly, the legislature might grant authority to exercise it to any corporation or individual, and that the grantee of this authority may determine whether it was to be exercised, and when, and to what extent; that inasmuch as the property is taken for the public use and the owner assured of a just compensation, the interest the grantee may have in the taking is of no consequence and that the owner has no constitutional right to be heard upon the question of necessity.

After examining numerous decisions, the court in course of its opinion (page 289) says:

> "The right to an inquiry as to the necessity is often denied when the general principles conceded in the discussion would seem to require a different conclusion * * *."

In another part of the opinion (page 290) the court remarks:

> "It is said by Mr. Cooley that 'the moment the appropriation goes beyond the necessity of the case it ceases to be justified on the principles which underlie the right of eminent domain'; and again, 'the right, being based on necessity, cannot be broader than the necessity which supports it'. But of what avail is this doctrine to the landowner if the taking is a conclusive determination of the existence and extent of the necessity?"

(The court then refers to the provision of the State Constitution that the taking must be necessary.) Later (page 292) it continues:

> "It is evident from the cases before considered that many courts shrink from saying that the property owner can never be entitled to a hearing on the question of necessity, and yet find it difficult, upon the theories they have adopted, to say when and how such a hearing will be accorded him. * * * The act under consideration authorizes the city to condemn property to provide a supply of water for the municipal purposes named. The meaning is, of course, that the city may take as much property as may be necessary for those purposes. The extent of the grant depends upon the extent of the necessity. If it takes more than is necessary, it is outside the power conferred. But if the theory contended for is correct, it can never get beyond its grant, for the act of taking determines the necessity and the necessity is the measure of the grant. Upon this reasoning we have a grant which

can be indefinitely extended by the act of the grantee and thus be made to legalize beyond the possibility of judicial inquiry a taking which it is not within the power of the legislature to authorize. It would seem from these considerations that the mere act of taking under a general authority of this character cannot conclude the rights of the owner. The petitionee concedes that the landowner will be entitled to the aid of the courts if the taking is tainted by fraud. This, of course, is not a hearing upon the question of necessity and is not claimed to be. The fact remains that under the proposed rule the owner may be deprived of land not needed for the public use, and be without remedy. To place the owner in this predicament, it is only necessary for the corporation taking the property to be sufficiently moderate to escape the charge of bad faith. Between the limit called for by necessity and the limit determined in bad faith there lies considerable territory as to which the law has had little to say. Within this range the landowner is left without other protection than the discretion of the taker. The theory seems to be that the legislature can take as much property as it judges to be necessary for the public use, and can therefore delegate to any applicant the right to take as much as he may consider necessary for that use. *This involves not only an exercise of legislative discretion by delegather authority, but an exercise of it by a party who is to be benefited thereby.* It is said, however, that the interest of the party who is to exercise the right is of no consequence, because the taking is for the public use, and must be limited to the public neces-

sity. But the taking is not limited to the public necessity by any other standard than the judgment of this interested taker.

"In this case the condemnation is by the officials of the municipality for whose use the property is taken. It is said that, whatever question may be made as to the propriety of delegating this power to private corporations or individuals, there is no basis for a doubt as to its propriety in the case of municipal corporations, these being but local branches of the government. *But a municipality has the same interest to extend the taking beyond the necessity that a private corporation or individual would have.* It is entitled to acquire enough to provide for the contingencies of fire and for the future wants of an increasing population; and in the meantime it can properly devote what is not required for existing public uses to uses that are not public. If it can secure, under the guise of providing for these uncertain but legitimate necessities, more than the law contemplates, it will swell the surplus available for the supply of private needs and thus increase illegitimately the profits available for the payment of its general expenses. And this advantage can accrue to the municipality without any exercise of bad faith or tangible violation of law. *Between the rights of the landowner and this appropriation and use of his property there stands only the judgment of officials interested to provide for the municipal expenses otherwise than by taxation and ready to believe that the most ample provision will be justified by the growth of their town".*

It should be noted that the Constitution of the

state in effect declared that private property could be taken only when necessary for public use. But it is, of course, universally recognized that this element is essential in all cases to the lawful exercise of the attribute of eminent domain by the sovereign.

In another leading case, *Tracy* vs. *Elizabethtown, etc., R. R. Co.,* 80 Ky. 259, the court said, page 265:

> "It is erroneous to suppose that the legislature is beyond the control of the courts in exercising the power of eminent domain, either as to the nature of the use or the necessity to the use of any particular property.
>
> For if the use be not public, or no necessity for the taking exists, the legislature cannot authorize the taking of private property against the will of the owner, notwithstanding compensation may be required."

In *Reed &c.* vs. *Louisville Bridge Company,* 8 Bush (Ky.) 69, at page 72, the court said:

> "But it is clear to us from the language of the grant that the company has the legal right to acquire title by condemnation to no lands except such as are 'necessary' for the erection of their bridge, the construction of their railroad, and the transaction of such business as legitimately grows out of these two improvements, and for such suitable avenues as are designated in their charter. * * * * * * Of the existence of this necessity the company is not to be the judge. It must be ascertained by a competent tribunal before which the parties whose lands are sought to be taken, as well as the company, can be heard".

In *Tedens et al.* vs. *Sanitary District,* 149 Ill. 87,

the Sanitary District was empowered by the legislature to condemn such land as was necessary for its object. It sought to condemn an island two miles long and about fourteen hundred feet wide. The owner claimed this was excessive. In connection with this phase of the controversy, the court at page 91 said:

> "While the District, by the act under which it was organized has ample power to condemn such a quantity of land as may reasonably be necessary to be taken and used to enable it to carry out the object and purpose contemplated by the legislature in passing the act, it has no right to abuse the power conferred, or to take more lands than are reasonably necessary to be used in the construction and maintenance of the drains and outlets. As appears from the petition the lands proposed to be taken embrace a strip over a quarter of a mile wide. Whether it was necessary that this amount of land should be taken; *or whether the condemnation of so large a tract was an abuse of power, was a question the defendants had the right to submit to the court* for determination before the jury was called upon to determine the amount that should be paid for the lands taken."

In *Railroad Company* vs. *Blake,* 9 Rich. (So. Car.) 228, a railroad company was empowered by the legislature to acquire lands by purchase or otherwise for all its railroad purposes, and in case an agreement for purchase could not be arrived at, commissioners might be appointed by the court on petition to assess the value of the land taken.

Being unable to agree with defendant, the railroad petitioned the court to appoint such commissioners, and defendant objected on the ground that the land in question was not needed for the railroad's purpises. The railroad replied that under the charter it alone was the judge of its needs, and demanded to have the land upon payment of the value thereof. It contended that the business of the court was merely to select the commissioners to assess damages, and that the question as to whether defendant's property was necessary was not for the court to decide. After referring to the fact that there was no provision governing the matter in the State Constitution, the court in a lengthy opinion held that the question was a judicial one.

B. & O. R. R. Co. vs. *The P. W. & Ky. R. R. Co.*, 17 West Va. 812, involved proceedings for the condemnation of land for a railroad. The statute provided for the appointment of commissioners by the court to assess damages, but there was no provision requiring notice to be given to the parties interested of the application to the court to appropriate the land. The railroad contended that the condemnation of the land for its purposes was an *ex parte* proceeding except on the question of damages.

In holding that the landowner has a right to be heard upon the subject of the appropriation of his property, the court *inter alia* said, page 830:

> "But there are general rules applicable to the rights of the citizen, which must not be disregarded in condemnation proceedings any more than in others. The law protects with jealous care the rights of the citizen, and while

> he must yield to the public necessity and surrender his private property to public use upon just compensation being paid or secured to him, yet in compelling him to do this, the courts will see to it that the rights guaranteed to him by the Constitution will receive full protection."

And at page 836 it said:

> "It is insisted by counsel for defendant in error that notice to the landowner is not requisite to the validity of the taking of the land, however it may be with regard to the assessment of damages; and they refer to Mills on Em. Dom. to sustain the proposition. Is Mr. Mills sustained by the authority he cites?"

After reviewing the citations the court said that they did not support the authors declaration. The court then proceeded to review at length various decisions bearing upon the question and concluded that the landowner was entitled to be heard on the question of the necessity for the taking. The court, in course of its opinion, page 835, quotes from *Cooper* vs. *Board of Works, etc.*, 108 Com. Law 180, the statement of Wills, J., that "a tribunal, which is by law invested with power to affect the property of one of Her Majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds; and that rule is of universal application, founded upon the plainest principles of justice."

In *Bennett* vs. *City of Marion,* 106 Iowa 628, the taking was by a city for the purposes of a sewer, under a State law giving "power to acquire real estate within and without their territorial limits,

necessary for the purpose of outlets for their sewers," to cities of the second class.

> "Is the determination of the City Council," says the court, "of the amount of land necessary for use as a sewer outlet final, or may the question be reviewed by the courts? If the amount sought to be condemned is in excess of that necessary for the improvement, the appropriation of such excess is not for the public use. * * * * With the policy or expediency of condemnation the courts have nothing to do. The necessity and the extent of the exercise of the power of eminent domain belong exclusively to the legislature,—the use being public,—provided just compensation is made, and the property subject to be taken will conduce to some extent to the accomplishment of the object to which it is devoted. * * * * * * The City Council had the power to finally determine the necessity of the improvement and its location, *but its determination of the amount of land necessary therefor is subject to review by the courts* * * * * * The danger always to be guarded against is the abuse of power, in taking more from the citizen than is reasonably required for the improvement contemplated." (Page 632).

Olmsted vs. *Proprietors of Morris Aqueduct,* 46 N. J. L. 495, involved the necessity of taking private property by a water company for the enlargement of its works. Among the questions brought in issue was the necessity for taking prosecutor's property.

> "The legislature," said the court, "has given power to divert such waters when necessary, but it is not for the corporation interested to

determine the necessity. As the question of necessity lies at the foundation of the proceedings to condemn, and as the power sought to be exercised is great, it should be kept in control by the court before which the question arises, and the court should be entirely satisfied of the need." (Page 500).

To the same effect is *Kountze* vs. *Morris Aqueduct,* 58 N. J. L. 303.

Grafton v. *Railway,* 16 *N. Dak.* 313 (1907) it is said

"If the distinction between the necessity for the exercise of the power and the necessity for the taking of the specific property sought to be condemned is kept in mind, but little difficulty will be encountered in properly understanding the correct rules as enunciated by the authorities."

"The former question is usually a political or legislative question, while the latter is always a judicial question or one in which the person's or corporations decision is subject to review by the courts."

In *Spring Valley Water Works* vs. *San Mateo Water Works et al.* 64 Cal. 123, in passing upon the necessity for taking private property by a water supply, the court said:

"Unquestionably where the object of public use is a supply of fresh water, the public have the right to an unstinted supply, and the corporation to whom has been granted the franchise to furnish the supply has the capacity to appropriate private property for that purpose.

But its capacity is limited to the real necessity which exists for the appropriation." (Page 133).

And in England when the property to be taken has not been specially defined, the courts will review the discretion exercised as to the quantity of land taken.

Lynch vs. *Sewer Commrs.*, 55 L. J. Ch. N. S. 409; L. R. 32 Ch. Div. 72.

Errington vs. *Metropolitan District R. Co.*, 51 L. J. Ch. N. S. 305; L. R. 19, Ch. Div. 559.

The case of *Lynch* vs. *Forbes*, 161 Mass. 302, is usually cited in support of the assertion that a proprietor has no right to be heard relative to the extent of the taking, and as opposed to the doctrine in *Stearns* vs. *Barre*, *supra*. *Lynch* vs. *Forbes*, *supra*, while denying the right of a proprietor to be heard in connection with the extent of the taking, said *inter alia*:

"Of course neither the State nor its delegates can take under the guise of eminent domain the property of A. for the purpose of conveying it to B., or for a purpose clearly in excess of or at variance with the powers granted."

The inconsistency of the decision in the case with this declaration is referred to by the court in *Stearns* vs. *The City of Barre*, *supra*, and is also commented upon in the editorial note to *Lynch* vs. *Forbes*, 42 American State Reports 406, where the writer says:

"These two statements seem to us necessarily in conflict with each other, for if it be true that neither the State nor its delegates can take property for a purpose clearly in excess of, or at variance with, the powers granted them, it must further be true that a court, jury, or some other judicial or *quasi*-judicial tribunal, must have authority to investigate the question, whether the attempted taking is in good faith, and whether the purpose for which the land is taken is within the scope of the acts authorizing such taking."

That the Forbes case is not consonant with the earlier view of the Massachusetts court is admitted by Mr. Nichols in 2 *Nichols on Eminent Domain* 922, where the writer says:

"In Massachusetts and several other states the constitutional provision aimed at the power of eminent domain is in terms applicable only 'whenever the public exigencies require that the property of an individual be appropriated,' and it was said by no less distinguished a jurist than Chief Justice Shaw that this provision by implication forbade the appropriation of private property unless the public exigencies required it. If this view is sound the existence of the exigency would be a matter for judicial determination as fully as the question whether the use was public or the compensation just."

McGehee on Due Process of Law (page 297), referring to the rule in the Forbes cases, says:

"The doctrine in Massachusetts is exceptional. The courts of that State hold that the

> question is always a legislative one, and the final decision rests, even when the power has been delegated, 'with the body or individuals to whom the State has delegated the authority to take'. * * * Usually, however, it is held that an agency vested with the power of eminent domain must, upon a proper issue, establish the fact of the necessity of the particular taking to the satisfaction of either the court or the jury or a statutory tribunal, as required by the local laws."

And at page 275 of the same book the author in referring to the cases in which the rule in the Forbes case is announced says that "in almost all these cases, the rule is merely stated in the course of argument, and is not applied, or the case is distinguished." (Note.)

The rule of condemnation by judicial decree has been the procedure observed by the federal government since the decision in the much cited case of *Kohl* vs. *United States,* 91 U. S. 367, in which, the acquisition of land for a post-office by condemnation being involved, and there being no method of procedure provided for, it was held that the condemnation must be effected through court proceedings. Since then the federal statutes which authorize the exercise of eminent domain by the government, while adopting the forms of local procedure as far as practicable, provide that condemnation shall be by judicial proceedings.

While the Legislature has the authority to declare when a necessity exists for the exercise of the power of eminent domain yet the use of any par-

ticular property for such public purpose may in the end be a question for the Courts.

Shoemaker vs. *United States,* 147 U. S. 282.

Fallbrook I. *Dist.* vs. *Bradley,* 164 U. S. 112.

Hairston vs. *D. & W. Ry. Co.,* 208 U. S. 598.

Sears vs. *Akron,* 246 U. S. 242.

In the year 1905, there were enatcted six statutes relating to the water supply of the city of New York. The principal and most important one is Chapter 724 of the Laws of 1905 of the State of New York, entitled "An Act to provide for an additional supply of pure and wholesome water for the city of New York; and for the acquisition of lands and interests therein; and for the construction of the necessary reservoirs, dams, aqueducts, filters, and other appurtenances for that purpose; and for the appointment of a commission with the powers and duties necessary and proper to attain these objects."

This act provides for a commission comprising three persons appointed by the mayor to be known as the board of water supply of the city of New York. The board is required to ascertain what sources exist which are most available, desirable and best for an additional supply of pure water for the city. The board is authorized to make a plan and report to the board of estimate and apportionment with recommendations as to what action should in its opinion be taken in reference thereto.

The board of estimate and apportionment may adopt, modify or reject the report of the board of water supply, but prior to the adoption or modification of any such plan or report the board of estimate and apportionment is required "to afford all persons interested a reasonable opportunity to be heard respecting the same and shall give reasonable public notice of such hearing whereat testimony may be produced by the parties appearing in such manner as the board of estimate and apportionment may determine. * * * Notice of such hearing shall be given in addition to the above provision by mailing to the chairman and clerk of the board of supervisors of the county where the real estate to be acquired is situated, a notice of such hearing at least eight days before the time named in said notice. * * *" (Laws 1905, Chapter 724, Sec. 5, as amended by Laws of 1906, Chapter 314, Sec. 1.)

It will thus be seen that in this great project the right of property owners affected by the act to notice and hearing in the matter of the expropriation was recognized and protected.

The act under consideration is revolutionary in its character in the history of water supply legislation in Rhode Island. It not only delegates in the first instance to the condemnation seekers the right to select the water source, but requires that seven present city officials must comprise the board having power. That board is further empowered to make a plan of the territory approved by it, and the City Council,—the very body which is seeking to obtain the private property,—is given full power to condemn all lands and waters it deems necessary for

water supply purposes, not only land within the designated area but lands and waters outside that area. The City Council is to be the sole and absolute judge of what lands are necessary for the said purpose. No right in any-wise to an appeal from the Council's determination is permitted; in fact the whole scheme of the act is to cut off any such right or to permit an impartial tribunal to pass upon the matter. There is absolutely no way by which a landowner can raise the question of the taking in any subsequent proceedings under the act, because under its provisions even after the filing of the statement and plat by the city,—thus vesting in it the fee simple in the premises condemned,—the city is not required to petition the court for the assessment of damages and thus leave an avenue for the landowner to come in and contest the taking. The city may remain absolutely inactive, taking only steps to obtain the fee, and the act then throws upon the landowner the burden of petitioning the court for an assessment of damages, so that by thus acting to protect himself the landowner is caused to commit himself to the lawfulness of the taking, no matter how unjustifiable and illegal the City Council's actions may have been.

The tremendous power which, if allowed to stand as constitutional, is vested in the City Council and its water board and may hereafter be vested in any municipal body in the State, in this matter is clear upon reflection. It is a cardinal principle of constitutional law that a court will consider not what

has been done under the act but what may be done under it,—in other words its entire scope.

Under the provisions of this act, the City Council may take (and purports to have taken) many villages, numerous mills, large quantities of waters, water rights, flowage rights and water power under the claim of necessity. It is admitted that there is no immediate need for a portion of the property thus taken and that a part of what has been taken will not be needed in connection with the water supply other than for the alleged protection from pollution, the only condition being that the City Council shall consider the taking necessary.

Valuable water rights, power rights, etc., have been taken which may never be used. The law is that the only grounds upon which eminent domain is justifiable are that the use be public and that the property be necessary to that use. But if this act be upheld, who can be heard to question the necessity for the expropriation?

Water rights have been taken which an inquiry might clearly show could be available for the use to which they are now put by their present owners without interfering with the object of the act. We may readily perceive that while certain waters might be necessary for the water supply, the power privileges could properly be used by the owners, as in *Kane* vs. *Mayor and Aldermen of the City of Baltimore, supra,* without interfering with the purity of the water supply. But how, under this act, can the owner have this question passed upon and his rights protected?

Flowage rights and power rights have been taken. At present these are not, and probably never will be, needed for the water supply and, if acquired in fee simple by the city, it is open to the city to later lease or sell these power rights to private individuals. What is to prevent the city, after obtaining the fee, to later use the power rights of the Sciuate Light and Power Company for the very purposes that the lighting company is now using the same, or from turning the same over to a competitor of complainant, if the city finds it has no use for same? Under the act, the owner is precluded absolutely from being heard in this or any other respect involving the necessity for the taking of his property.

The attempt to vest such a power in a partisan and interested tribunal is something which needs only to be stated to be condemned and an act which purports so to do falls far short of meeting the requirements of due process of the law which this court has said means "in the due course of legal proceedings acording to those rules and forms which have been established for the protection of private rights," and therefore contravenes Article XIV of Amendments to the Constitution of the United States.

CONCLUSION

It is submitted that the act entitled "AN ACT TO FURNISH THE CITY OF PROVIDENCE WITH A SUPPLY OF PURE WATER," the same being Chapter 1278 of the Public Laws of 1915, contravenes the provisions of Article XIV of the Amendments to the Constitution of the

United States and is therefore unconstitutional and void: Because under its terms plaintiffs in error are deprived of their property without due process of law, without remedy by recourse to the laws, conformably to the laws, or by the law of the land:

It is also unconstitutional and void because it purports to impose upon the taxpayers of the City of Providence a burden, not undertaken solely for the benefit of the City of Providence, but for other municipalities and companies which are required in no way to share such burden or any part thereof.

It is also unconstitutional and void in that it purports to authorize the taking of the property of plaintiffs in error and to divest the title thereof from the plaintiffs in error and to vest the same in the City of Providence without requiring that any value thereof shall be fairly found before such taking or vesting, and without requiring that any payment therefor shall be made or tendered or sufficiently secured before or at the time of such taking or vesting of title, or absolutely, at any time; and that it purports to authorize the ousting of plaintiffs in error from the use and possession of their property before any payment of fair compensation shall be determined in amount, made, or properly secured, and without absolutely requiring the payment of any fair value at any time; and likewise purports to authorize the City of Providence to lease or sell the whole or portions of the property of plaintiffs in error for purposes other than public

and without any payment to plaintiffs in error therefor being absolutely required.

It is also unconstitutional and void because it is unfair and arbitrary in the provisions thereof relating to the payment of incidental damages caused by such taking, whereby persons who justly should be entitled to the same will be unjustly deprived of any such damages, and because said act makes improper and unfair discriminations in the allowance of such damages.

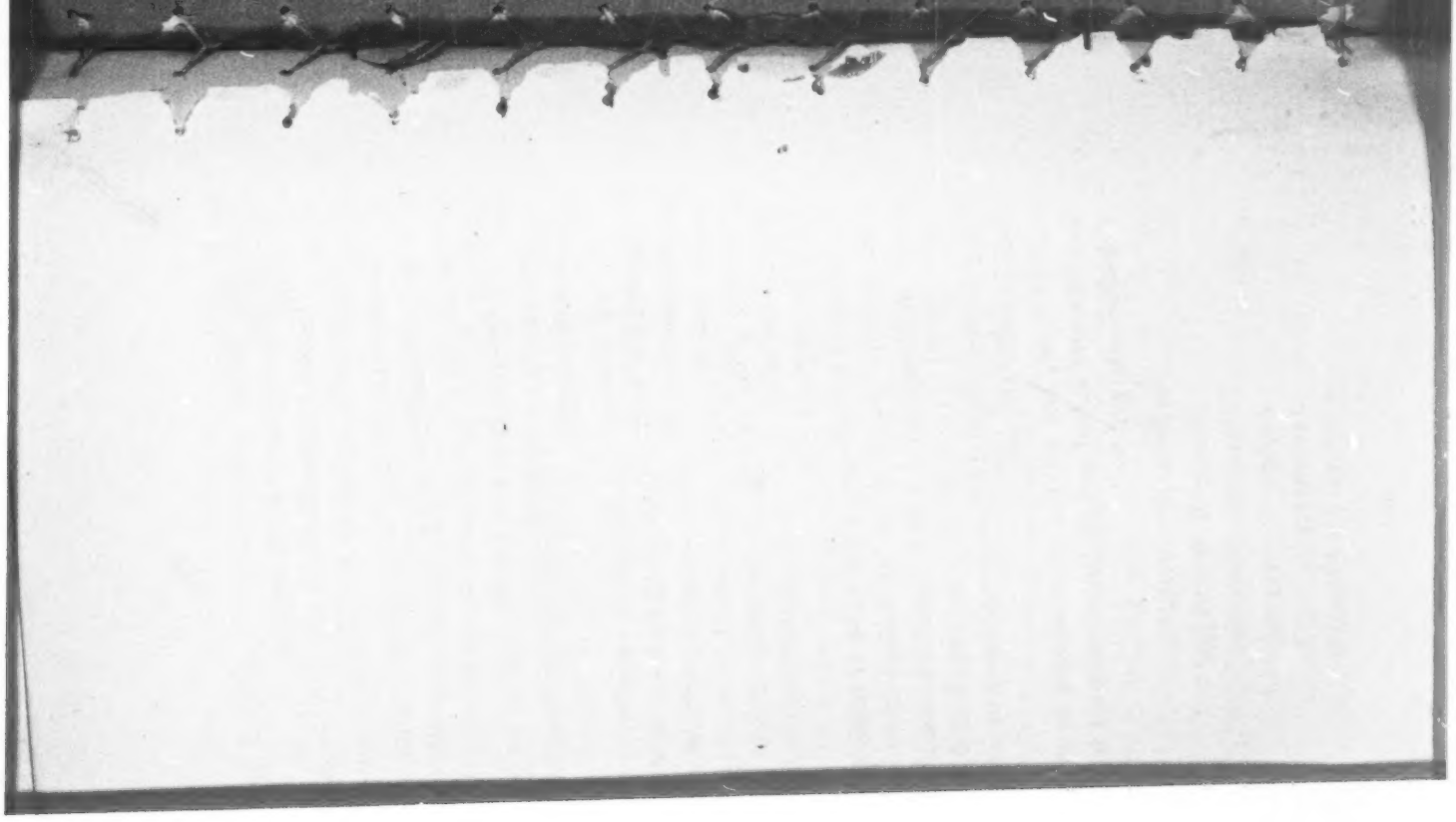
And because the pretended exercise of such power has been authorized by said act in a manner that is unfair and not impartial, without granting any hearing to the plaintiffs in error on the matter of the necessity of the taking of their property, the same being of the utmost importance to the plaintiffs in error.

Because an exercise of the right of eminent domain is purported to be authorized thereunder in a way inconsistent with the constitutional rights of plaintiffs in error, and by a body not vested with any portion of sovereign power necessary to sustain the exercise thereof.

For these, and for the other reasons in detail herein above stated and explained, said act is unconstitutional and void.

Respectfully submitted,

ROBERT H. MCCARTER,
FRANCIS I. MCCANNA,
ALFRED G. CHAFFEE,
JAMES HARRIS,
Attorneys for Plaintiffs in Error.



FILED
APR 2 192
WM. R. STANSB
CLE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922.

JOSLIN MANUFACTURING COMPANY
vs.
CITY OF PROVIDENCE, WALTER L. CLARKE, CITY TREASURER, ET AL.
No. [redacted]2

SCITUATE LIGHT & POWER COMPANY
vs.
CITY OF PROVIDENCE, WALTER L. CLARKE, CITY TREASURER, ET AL.
No. [redacted]2

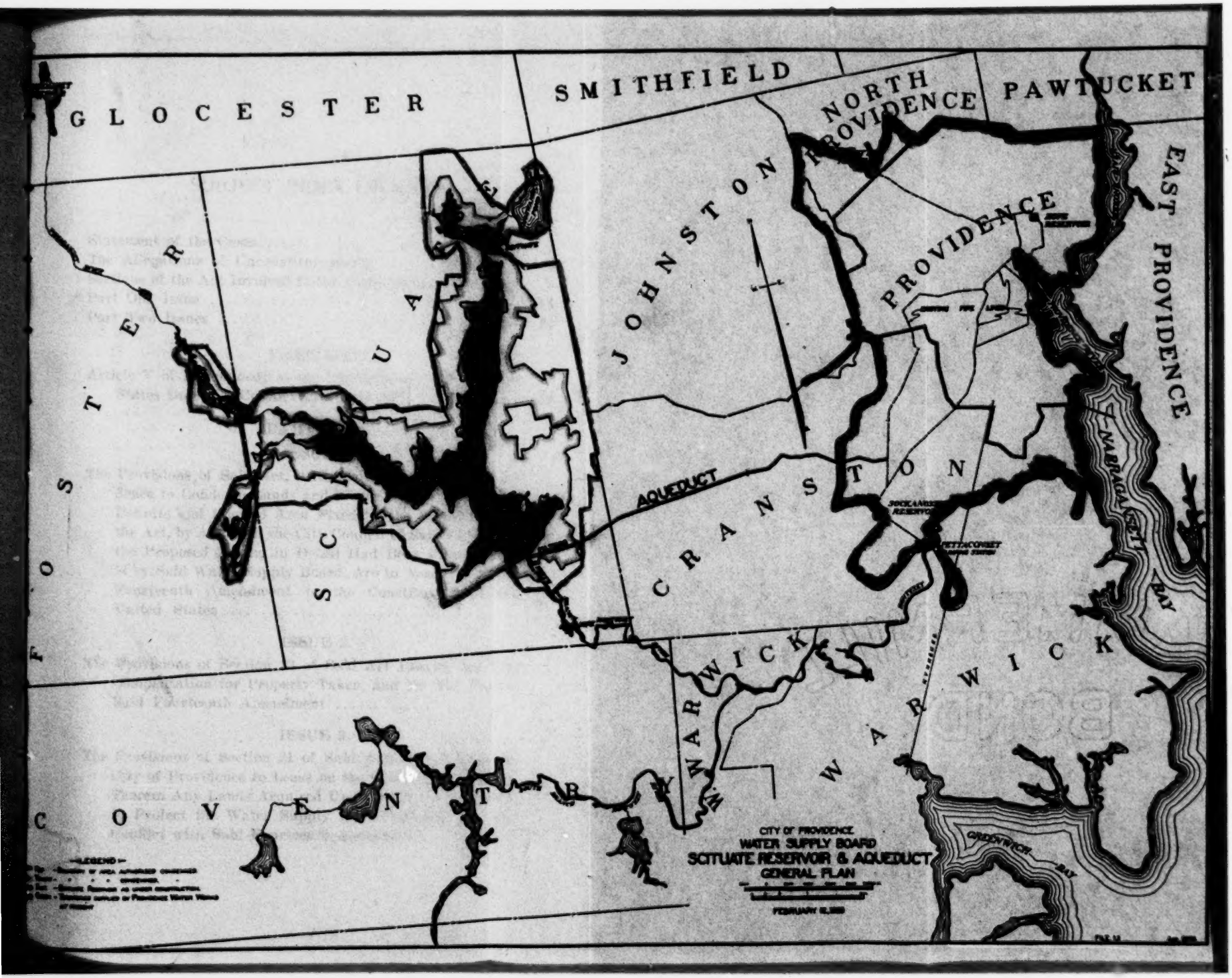
THERESA B. JOSLIN
vs.
CITY OF PROVIDENCE, WALTER L. CLARKE, CITY TREASURER, ET AL.
No. [redacted]2

In Error to the Superior Court of the State of Rhode Island.

Brief for the Defendants In Error.

ELMER S. CHACE,
ALBERT A. BAKER,
Attorneys for the Defendants in Error.

PAGES CUT OFF


GLOCESTER
SMITHFIELD
NORTH PROVIDENCE
PAWTUCKET
EAST PROVIDENCE
JOHNSTON
PROVIDENCE
FOSTER
SCITUATE
CRANSTON
AQUEDUCT
NARRAGANSETT BAY
WARWICK
WARWICK
COVENTRY
GREENWICH BAY
CITY OF PROVIDENCE
WATER SUPPLY BOARD
SCITUATE RESERVOIR & AQUEDUCT
GENERAL PLAN

SUBJECT INDEX OF BRIEF.

PAGE.

Statement of the Cases 1
The Allegations of Unconstitutionality 2
Sections of the Act Involved in the Constitutional Questions 5
Part One Issue 14
Part Two Issues 15

PART ONE.

Article V of Amendment to the Constitution of the United States Does Not Conflict with Said Act 17

PART TWO.

ISSUE 1.

The Provisions of Said Act, Authorizing the City of Providence to Condemn Lands and Water Rights Within the Definite and Limited Area Fixed by the Legislature in the Act, by Action of the City Council of Said City After the Proposed Taking in Detail Had Been Presented to It by Said Water Supply Board, Are in Accord with the Fourteenth Amendment to the Constitution of the United States 19

ISSUE 2.

The Provisions of Section 23 of Said Act Provide for Due Compensation for Property Taken, and Do Not Violate Said Fourteenth Amendment 27

ISSUE 3.

The Provisions of Section 21 of Said Act, Authorizing the City of Providence to Lease on the Conditions Specified Therein Any Lands Acquired Under Said Act and Held to Protect the Water Supply from Pollution, Do Not Conflict with Said Fourteenth Amendment 37

ISSUE 4. PAGE.

The Provision of Section 25 of Said Act, Authorizing the City of Providence, Upon Taking Possession of Lands, to Sell and Cause to be Removed Any Buildings or Improvements which Would Obstruct the Work, Does Not Violate Said Fourteenth Amendment..... 42

ISSUE 5.

The Provisions of Section 18 of Said Act, Giving to Certain Municipalities and Water and Fire Districts the Right to Take and Receive Water and Permitting the City of Providence to Sell Water to Water Companies Located Within the Drainage District, on the Terms and Conditions Specified Therein, Do Not Conflict with Said Fourteenth Amendment..... 46

POINT I.

Although in the Absence of Statutory Authority, it May be Doubtful Whether a City, Owning Its Water Supply System, Would Have Authority to Supply Other Municipalities with Water, It is Well Established That Such Practice is Proper Where Statutory Authority Has Been Given 51

POINT II.

The Discretion and Judgment of the General Assembly in the Exercise of the Legislative Power of the State as Shown in the Plan and Provisions of the Act, and the Action of the City Council Representing the Governmental and Prudential Powers of the City in Accepting the Act and Carrying Out Its Provisions, Can Not, in the Absence of Evident Bad Faith or Gross Abuse, be Challenged by Taxpayers of the City 60

A.

There Are No Allegations of Fact Showing Bad Faith or Gross Abuse 60

B. PAGE.

The Legislature May Properly Impose Reasonable Conditions in Granting Such a Franchise 62

C.

Taxpayers as Such in No Way Represent the Public Interests, and to Overthrow Such a Statute Must Show a Fraud Upon, and Illegal Exaction from, the City..... 63

D.

A Municipality Has the Power to Expend Money for a Public Purpose of the Municipality, Although Benefit be Conferred Thereby Upon Communities Outside the Municipal Territory 69

POINT III.

The Provision of Said Section 18 That, in Case of a Failure to Agree Upon the Fair Wholesale Rates for Water Taken for the Supply of Said Outside Communities Having No Other Water Supply, the Same Shall be Determined by Arbitration, Does Not Violate Due Process of Law 77

POINT IV.

If the Provisions of Said Section 18, or Some Particular Provision or Provisions Thereof, Were Held to Conflict with Said Fourteenth Amendment, They Are Separable and Would Not Affect the Main Provisions of Said Act..... 78

POINT V.

The Cases Cited by the Plaintiffs in Error Relative to Said Section 18 Either Do Not Appear to be in Point or Were Cases Where a Real Adverse Burden Was Laid by the Act, Which Not Only Was Not Accepted but Was Resisted by the Public Authorities or the District Objecting 79

ISSUE 6. PAGE.

The Provision of Section 16 of Said Act, Permitting the Owner of a Business Established Prior but Not Subsequent to the Passage of Said Act to Recover Damages to Such Business Caused by the Taking of Lands and Water Rights, Does Not Violate the "Equal Protection" Clause of Said Fourteenth Amendment..... 79

POINT 1.

The Plaintiffs in Error Do Not Show Any Legal Interest in the Question 80

POINT 2.

There is No Denial of the Equal Protection of the Laws.... 82

A.

The Equal Protection Clause of Said Fourteenth Amendment Does Not Apply to Said Section Giving a Right to Recover Business Damages 82

B.

If Said Fourteenth Amendment Did Apply, Said Provision Makes a Reasonable and Necessary Classification..... 88

ISSUE 7.

The Provision of Section 12 of Said Act, Allowing an Owner of a Mill, Who Has Not Surrendered the Machinery Therein, to Recover the Reasonable Cost of Removing Such Machinery to a Point Within but Not Without the New England States, Does Not Conflict with Said Fourteenth Amendment 91

POINT I.

The Plaintiffs in Error Do Not Show Any Legal Interest in Said Question 92

POINT II.

If the Plaintiffs in Error Had Shown a Legal Interest in Said Question, Said Provision Does Not Deny the Equal Protection of the Laws 93

A. PAGE.

The Provisions of Said Section 12 Do Not Create a Classification 93

B.

The Issue Is, Did the State Have the Power to Extend Such a Limited Right 94

C.

If There Were a Right, Independent of Statute, to Recover the Reasonable Cost of Removing Machinery, Said Provision Provides for Such Reasonable Recovery 100

ISSUE 8.

The Legislature Had Power to Grant the Franchise Under the Act Subject to the Conditions and the Requirements of Compensation for Consequential Damages 102

POINT I.

The Provisions for Consequential Damages Do Not Conflict with the Judicial Power or Its Exercise 103

POINT II.

Said Act Does Not Unduly Discriminate and Violate the "Equal Protection of the Laws" 106

POINT III.

The Plaintiffs' Claim, That the Extension of the Compensation to Include Consequential Damages is Confiscatory and Deprives Them of Their Property Without Due Process of Law, Cannot be Maintained 107

SUBJECT INDEX OF APPENDIX.

PART ONE.

PAGE.

All Matters of Judgment Relative to the Necessity and Extent of a Taking Are for the Legislature to Determine and Not for the Courts, and This Public Power May be Delegated to and Exercised by a Municipality Without Granting Hearings to Property Owners..... 1

Authorities Cited by the Plaintiffs in Error Relative to the Necessity and Extent of the Taking, and Comments Thereon..... 12

PART TWO.

The Provisions of Section 23 of Said Act Provide for Due Compensation for Property Taken, and Do Not Violate Said Fourteenth Amendment..... 15

Authorities Cited by the Plaintiffs in Error Relative to the Plaintiffs' Claim That Compensation Must Precede the Possession and Use of the Lands Taken, and Comments Thereon..... 22

PART THREE.

The Fundamental Provisions of Said Act Are in Accord with Established Legislative Practice and Such Practice is Entitled to Great Weight in Deciding Any Questions as to Their Constitutional Validity..... 23

POINT I.

The Fundamental Provisions of Said Act Are in Accord with the Established Legislative Practice in Rhode Island..... 23

POINT II.

The Fundamental Provisions of Said Act Are Also in Accord with the Established Legislative Practice in Other States..... 35

POINT III. PAGE.

Such Well Established Legislative Practice is Entitled to Great Weight in Deciding Any Questions as to the Constitutional Validity of Any of the Provisions of Said Act 38

PART FOUR.

Opinion of the Supreme Court of Rhode Island Holding, Among Other Things, That Said Act Does Not Violate Said Fourteenth Amendment 39

AUTHORITIES AND CASES REFERRED TO IN THE BRIEF.

PAGE.

Adirondack Ry. Co. v. People of the State of New York, 176 U. S. 335; 44 L. ed. 492 23
Appeal of County of Delaware, 119 Pa. St. 159..... 46
Aldrich v. Tripp, 11 R. I. 141, 145-6..... 66
Admiral Realty Co. v. City of New York, 216 N. Y. 110, 114, 117 70
Amer. & English Ann. Cases, Vol. 8, Note, 696..... 99
Barron v. Baltimore, 7 Pet. 243, 247, 250; 8 L. ed. 672, 674, 675 17
Brown v. Walker, 161 U. S. 591, 606; 40 L. ed. 819, 824..... 19
Brown v. New Jersey, 175 U. S. 172, 174; 44 L. ed. 119, 120. 19
Backus Jr. & Sons v. Fort St. Union Depot Co., 169 U. S. 557; 42 L. ed. 853 24
Baltimore Boom Co. v. Patterson, 8 Otto, 403, 406; 25 L. ed. 206, 207 24
Bragg v. Weaver, 251 U. S. 57, 58; 64 L. ed. 135, 137..... 26
Bragg v. Weaver, *supra*, p. 61-2..... 35
Boston v. Talbot, 206 Mass. 82..... 39
Bates v. Bassett, 60 Vt. 530; 15 Atl. 200..... 40
Bryant v. Logan, 56 W. Va. 141; 49 S. E. 21..... 40
Burnett v. Boston, 173 Mass. 176..... 55
Board of Comrs. of Larimer County v. City of Ft. Collins, 68 Col. 364; 189 Pac. 929..... 58
Brummit v. Ogden Water Works Co., 33 Utah, 285, 296..... 64
Becker v. Philadelphia & R. T. R. Co., 177 Pa. 252; 35 Atl. 617 99
Cooley's Const. Lim. 7th ed. p. 183..... 28
Crozier v. Fried Krupp Aktiengesellschaft, 224 U. S. 582; 56 L. ed. 771..... 35
City of Newport v. Horton, 22 R. I. 196..... 38
Connolly v. Van Wyck, 72 N. Y. Supp. 382..... 43
City of So. Pasadena v. Pasadena L. & W. Co., 152 Cal. 579. 53
Colorado Springs v. Colorado City, 42 Col. 75; 94 Pac. 316. 54
Childs v. Columbia, 87 S. C. 566; 70 S. E. 296..... 54

PAGE.

City of Rochester v. Briggs, 50 N. Y. 553..... 54
City of Henderson v. Young, 119 Ky. 224, 227..... 65
County of Mobile v. Kimball, 102 U. S. 691..... 76
City of Newport v. Horton, *supra*, p. 196, 200..... 81
Cooley's Const. Lim., *supra*, 231, 232..... 82
Cox v. Phil. H. & P. R. Co., 215 Pa. 506; 64 Atl. 729..... 84
City of Oakland v. Pacific Coast Lumber & Mill Co. Cal. 153 Pac. 705, 707..... 85
Civil Rights Cases, 109 U. S. 3; 27 L. ed. 835..... 86
C. P. R. Ry. Co. v. Pearson, 35 Cal. 247, 263..... 97
District of Columbia v. Washington Steel & Ordnance Co. 43 D. C. App. 344, 349..... 24
Dillon Mun. Corp. 5th ed. Vol. 3, Sec. 1299, p. 2121..... 52
Davidson v. New Orleans, 96 U. S. 97..... 77
Davis v. Commonwealth, 167 U. S. 43; 42 L. ed. 71..... 87
Dillon Mun. Corp. Vol. 1, Sec. 379, N. 691..... 104
East Shore Land Co. v. Peckham, 33 R. I. 541..... 30
Emery v. Boston Terminal Co. 178 Mass. 172; 59 N. E. 763.. 99
Earle v. Commonwealth, 180 Mass. 579, 582..... 104
Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 158; 41 L. ed. 369, 388..... 18
Fogarty v. Cincinnati, 90 Ohio Dec. 753..... 46
Fellows v. City of Los Angeles, 151 Cal. 52, 63..... 52
Gelpecke v. City of Dubuque, 1 Wall. 175; 17 L. ed. 522, 525. 71
Guthrie Nat. Bank v. Guthrie, 173 U. S. 528, 536..... 77
Grainger v. Douglas Park Jockey Club, 148 Fed. 513..... 90
Home Telephone Co. v. Los Angeles, 211 U. S. 265; 53 L. ed. 176 24
Howe v. Norman, 13 R. I. 488, 494..... 30
Hays v. Port of Seattle, State of Washington et al., 251 U. S. 233, 238; 64 L. ed. 243, 246..... 36
Hellen v. Medford, 188 Mass. 42; 73 N. E. 1070..... 41
Heyward v. New York, 8 Barb. 486..... 41
Hill v. Wine, 54 N. Y. Supp. 892..... 43
Hewitt v. San Jacinto & P. V. Irrig. Dist., 124 Cal. 186, 192.. 54
Halifax v. Soothill Upper Local Board, 31 L. T. N. S. 6..... 56

PAGE.

Hall Const. Law, p. 187-8 69
Haeussler v. City of St. Louis, 205 Mo. 656, 681 75
Henderson Bridge Co. v. Henderson, 173 U. S. 592, 615 76
Hunter Admr. v. Chesapeake & O. R. Co., 107 Va. 158; 59 S. E. 415 86
In re Pawtucket etc. Grade Crossing Commission, 36 R. I. 200 32
In re Wellington, 16 Pick. 87; 26 Am. Dec. 631 82
In re Mt. Washington, 35 N. H. 134, 147 86
Joslin Manufacturing Co. v. Providence, Transcript of Record p. 99 19
Joslin Manufacturing Co. v. Clarke City Treas. of Providence, 41 R. I. 350, 359, (Appendix to the Brief Part Four, p. 39) 26
Joslin Mfg. Co. v. Clarke City Treas., *supra*, p. 359 32
Jones v. Sanford, 66 Me. 585 40
Jeffersonville etc. R. R. Co. v. Daugherty, 40 Ind. 33 45
Joslin Mfg. Co. v. Clarke City Treas. *supra* 62
Joslin Mfg. Co. v. Clarke, City Treas., *supra*, p. 360 78
Jackson v. State, 160 App. Div. N. Y. 110; 145 N. Y. Supp. 131 95
Kelly v. Pittsburg, 104 U. S. 78; 26 L. ed. 658, 659 18
Kaukana Water Power Co. v. Green Bay & Miss. Canal Co., 142 U. S. 254, 273 56
Kossler v. Pittsburgh Ry. Co., 208 Pa. St. 50; 57 Atl. 66 86
Kansas City Southern Ry. Co. v. Anderson, 88 Ark. 129, 133; 113 S. W. 1030 96
Lewis Em. Dom. 3d ed. Vol. 2, Sec. 679, p. 1166 28
L. R. A. (N. S.) 31, Note, p. 580 41
Lewis Em. Dom. Vol. 2, p. 1500 41
Lewis Em. Dom. Vol. 1, Sec. 410, p. 740 63
Lewis v. City of Providence, 10 R. I. 97, 101 65
Lewis Em. Dom. Vol. 2, Sec. 727, p. 1271 85
L. R. A. (N. S.) 4, Note, 890 99
Monongahela Nav. Co. v. U. S., 148 U. S. 312; 37 L. ed. 922 .. 24

PAGE.

Madisonville Traction Co. v. St. Bernard Mining Co., 196 U. S. 239; 49 L. ed. 462 34
Moore v. Sanford, 151 Mass. 285; 24 N. E. 323 39
McConihay v. Wright, 121 U. S. 201; 30 L. ed. 932 41
McCormick et al. v. President etc. of Town of Lafayette, Ind. 1 Cart. 48 45
McQuillin Mun. Corp., Vol. 4, p. 3858 51
McQuillin Mun. Corp., Vol. 4, Sec. 1258, p. 3077 63
McQuillin Mun. Corp., Vol. 5, Sec. 2575, p. 5316 64
Moore v. City of Walla Walla, 60 Fed. 961 65
Matter of Mayor of New York, 99 N. Y. 570, 584-5 66
Merrick v. Inhabitants of Amherst, 12 Allen (Mass.) 500 ... 68
McCutcheon v. Terminal Station Commission of Buffalo, 217 N. Y. 127; 111 N. E. 661 68
McMurray v. Kansas City, 283 Mo. 479, 492-4; 223 S. W. 615, 619 73
Metropolitan Bd. of Works v. McCarthy, L. R. 7 H. L. 243 ... 86
Madden v. Lancaster County, 65 Fed. 194 87
Mo. Pac. Ry. Co. v. Porter, 112 Mo. 361; 20 S. W. 568 97
Matter of Borup, 182 N. Y. 222, 226 105
Nichols Em. Dom. 2d ed. Vol. 1, Sec. 210, p. 635 29
Nichols Em. Dom. Vol. 2, Sec. 373, p. 1022 36
Nichols Em. Dom. Vol. 2, p. 1500 41
New Orleans v. N. O. Water Works Co., 142 U. S. 79, 93 65
Nichols Em. Dom. Vol. 1, Sec. 124, p. 366; Sec. 229, p. 698 .. 85
N. Y. C. R. R. Co. v. Pierce, 35 Hun. N. Y. 306 96
N. Y. C. R. R. Co. v. Albany Steam Trap. Co., 146 N. Y. Supp. 674; 161 App. Div. 329 96
N. Y. N. H. & H. R. Co. v. Blacker, 178 Mass. 386; 59 N. E. 1020 98
North Coast R. Co. v. Kraft Co., 63 Wash. 250; 115 Pac. 97. 99
Nichols Em. Dom. Vol. 2, Sec. 348, p. 965-967 103
Omaha Water Co. v. Omaha, 89 C. C. A. 205; 162 Fed. 225; 218 U. S. 180 56
Opinion to the Governor, 24 R. I. 603, 607 89
Penniman's Case, 103 U. S. 714; 26 L. ed. 602 38

PAGE.

Presser v. Illinois, 116 U. S. 252; 263 38
Pittsburg v. Brace Brothers, 158 P. A. 174; 27 Atl. 854 55
Pikes Peak Power Co. v. City of Colorado Springs, 105 Fed. 1, 14 57
Paris Mountain Water Co. v. City of Greenville, 110 S. C. 36, 55; 96 S. E. 545, 549, 550 57
People ex rel. Lasher v. City of New York, 134 App. Div. 75, 78-9 62
Prince v. Crocker, 166 Mass. 347, 357 67
People ex rel. Murphy v. Kelly, 76 N. Y. 475, 487-8 70
Peabody v. Westerly Water Works, 20 R. I. 176 72
Penniman's Case, *supra* 81
Pause v. City of Atlanta, 98 Ga. 92, 105 86
People ex rel. Burhans v. City of New York, 198 N. Y. 439, 446 105
Rogers v. City of Wickliffe, 29 K. L. Rep. 587; 94 S. W. 24.. 56
Russell Arbitration and Award (10th ed.) p. 8-11 78
Ranlet v. Concord R. Co., 62 N. H. 561 99
Spies v. Illinois, 123 U. S. 131; 31 L. ed. 80, 86 19
Shoemaker v. U. S., 147 U. S. 282, 298; 37 L. ed. 170, 184... 24
Sears v. City of Akron, 246 U. S. 242, 251; 62 L. ed. 688, 698. 25
Sweet v. Rechel, 159 U. S. 380, 402; 40 L. ed. 188 32
State v. Snow, 3 R. I. 64 38
Smeaton et al. v. Martin, 57 Wis. 364 44
State v. Hill, 100 N. C. 497 45
Savannah v. Kelly, 108 U. S. 184, 187; 27 L. ed. 696, 697.... 71
Sedgwick Stat. & Const. Law, p. 505 71
Steamship Co. v. Emigration Comrs., 113 U. S. 33, 39; 28 L. ed. 899 81
State ex rel. v. Blake, 241 Mo. 100; 144 S. W. 1094 82
Sawyer v. Commonwealth, 182 Mass. 245; 65 N. E. 52 83
Sutherland Damages, 4th ed., Vol. 4, Sec. 1071, 4023 85
State v. Farmers Irr. Co., 59 Neb. 1, 4; 80 N. W. 53 91
Springfield Southwestern R. Co. v. Schweitzer, 173 Mo. App. 650; 158 S. W. 1058 97

PAGE.

Twitchell v. Pennsylvania, 7 Pet. 243, 247, 250; 8 L. ed. 672, 674, 675 18
Twining v. New Jersey, 211 U. S. 78, 93; 53 L. ed. 97, 103... 19
Talbot et al. v. Hudson et al., 16 Gray 417..... 44
Town of Kearney v. Mayor etc. of Bayonne, 90 N. J. Eq. 499, 504-5; 107 Atl. 169 58
Town of Tahlequah v. Quinn, 5 Ind. Ter. 497..... 64
Taylor's Due Process of Law, Sec. 229..... 86
U. S. v. Cruickshank, 92 U. S. 542; 23 L. ed. 588, 591..... 18
U. S. v. Gettysburg Electric Ry. Co., 160 U. S. 668, 685; 40 L. ed. 576, 582..... 24
U. S. v. Chandler-Dunbar Co., 229 U. S. 53; 65; 57 L. ed. 1063, 1076 24
U. S. v. Chandler-Dunbar Co., *supra*, 72-73..... 56
U. S. v. Cruickshank, *supra*, 588..... 86
U. S. v. Heyers et al., 190 Fed. 688..... 95
Voelcker v. Schnell, 166 N. Y. Supp. 420, 425..... 69
Williams v. Parker, 188 U. S. 491; 47 L. ed. 559..... 34
Wheeler v. Essex Public School Board, 39 N. J. L. 201, 297.. 46
West Hartford v. Water Comrs., 68 Conn. 323; 36 Atl. 786.. 56
Wells v. Atlanta, 43 Ga. 67, 78..... 64
Williams v. Eggleston, 170 U. S. 304, 310..... 77
Whitehouse Equity Practice, p. 185..... 81
Whiting v. Commonwealth, 196 Mass. 468; 82 N. E. 670.... 84
Whiting v. Commonwealth, *supra*, 470..... 90

AUTHORITIES AND CASES REFERRED TO IN THE APPENDIX.

	Page.
Boston v. Talbot, 206 Mass. 82; 91 N. E. 1014	4
Burnett v. Boston, 173 Mass. 173, 176	6
Board of Water Comrs. v. Manchester, Conn. 96 Atl. 182, 185	6
Board of Water Comrs. v. Johnson, 86 Conn. 151; 84 Atl. 727	6
Bond v. M. & C. C. of Baltimore et al., 116 Md. 683; 82 Atl. 978	11
Briggs v. Cape Cod Ship Canal Co., 137 Mass. 71	16
Barton v. Edwards, 120 Ark. 239; 179 S. W. 354	21
Black on Inter. of Laws, p. 41	38
Black on Inter. of Laws, *supra*	39
Cooley Const. Lim. 7th ed. p. 77	3
City of Grafton v. St. Paul M. & M. R. Co., 16 N. Dak, 313; 113 N. W. 598	12
Connolly v. Van Wyck, 72 N. Y. Supp. 382	17
Dillon Mun. Corp. Vol. 3, Sec. 1023, p. 1619	2
Dromberger et al. v. Reed, 11 Ind. 420	21
Endlich on Inter. of Statutes, Secs. 357, 358	38
Hayford v. Municipal Officers of Bangor, 102 Me. 340; 66 Atl. 731	8
Henderson v. City of Lexington, 132 Ky. 390; 22 L. R. A. (N. S.) 20	11
Henderson v. City of Lexington, *supra*, p. 405	13
Hydro-Electric Co. v. Liston, 70 W. Va. 83	14
Haverhill Bridge Props. v. County Comrs. of Essex, 103 Mass. 120, 124	15
In re R. I. Suburban Ry. Co., 22 R. I. 458	3
Irrigation Co. v. Klein, 63 Kan. 484	9
In re Elm Street, 72 N. Y. Supp. 378	18
In re Walton Ave., 131 App. Div. 696; 116 N. Y. Supp. 471	18
In re Newton Ave., 173 App. Div. N. Y. 15	18

PAGE.

In re City of Cedar Rapids, 85 Iowa 39; 51 N. W. 1142.... 21
Jane v. Racine, 155 Wis. 1, 18..... 23
Lewis Em. Dom. Vol. 1, Sec. 255, p. 502; Sec. 369, p. 674.... 2
Lynch v. Forbes, 161 Mass. 302..... 5
L. R. A. Vol. 22 (N. S.), Note 1, 64..... 11
L. R. A. Vol. 58, Note, 240..... 11
Lewisburg Bridge Co. v. Union County et al., 232 Pa. 255; 81 Atl. 324 18
Loweree v. City of Newark, 38 N. J. 151, 154..... 20
Lewis' Sutherland Statutory Construction, 2nd ed. Vol. 21 p. 888 38
McQuillin Mun. Corp., Vol. 4, Secs. 1458, 1466, 1495, p. 3077, 3089, 3128 1
Matter of City of New York (Ely Ave.) 217 N. Y. 45..... 7
McGehee Due Process of Law, p. 296-7..... 12
Matter of Mayor, etc. of New York, 99 N. Y. 569; 2 N. E. 642 16
N. Y. N. H. & H. R. R. Co. v. Long, 69 Conn. 424; 37 Atl. 1070 7
Orr v. Quimby, 54 N. H. 590, 593..... 19
Pittsburg F. T. W. & C. R. Co. v. Sanitary District, 218 Ill. 286; 75 N. E. 892..... 11
Pittsburg Hydro Electric Co. v. Liston, 70 W. Va. 83; 73 S. E. 86 11
Pittsburg R. Co. v. Sanitary District, *supra*..... 13
Richland School Tp. v. Overmeyer, 164 Ind. 382, 385; 73 N. E. 811 4
Rumford & Mexico Bridge District v. Mexico Bridge Co., 115 Me. 154; 98 Atl. 625..... 8
Sloan v. Lawrence County, 134 Ark. 121, 128-9; 203 S. W. 260, 261 10
State v. District Court, Minn. 158 N. W. 240..... 11
State v. Stewart, 74 Wis. 620; 6 L. R. A. 394..... 11
Stearns v. City of Barre, Vt. 50 Atl. 1068..... 11

PAGE.

State Water Supply Com. v. Curtis, 192 N. Y. 319; 85 N. E. 148 18
State v. Several Parcels of Land, 79 Neb. 638, 648 21
State v. Messinger, 27 Minn. 119; 6 N. W. 457 21
Steenerson v. Fontaine, 106 Minn. 225; 119 N. W. 400 21
Sweet v. Rechel, 159 U. S. 380 22
State v. Several Parcels of Land, *supra* 22
Talbot v. Hudson, 16 Gray, 417 6

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922.

JOSLIN MANUFACTURING COMPANY
vs.
CITY OF PROVIDENCE, WALTER L. CLARKE, CITY TREASURER, ET AL. — No. 640

SCITUATE LIGHT & POWER COMPANY
vs.
CITY OF PROVIDENCE, WALTER L. CLARKE, CITY TREASURER, ET AL. — No. 641

THERESA B. JOSLIN
vs.
CITY OF PROVIDENCE, WALTER L. CLARKE, CITY TREASURER, ET AL. — No. 642

In Error to the Superior Court of the State of Rhode Island.

Brief for the Defendants In Error.

STATEMENT OF THE CASES.

These are three Bills in Equity brought in the Superior Court of Rhode Island, Providence County, by the Joslin Manufacturing Company, the Scituate Light & Power Company, both Rhode Island corporations, and Theresa B. Joslin

of the Town of Scituate in said county and state, against the City of Providence, the City Treasurer thereof and the Water Supply Board thereof.

The bills allege that certain provisions of "An Act to Furnish the City of Providence with a Supply of Pure Water," Chapter 1278 of the Public Laws of Rhode Island, approved April 21, 1915, are in conflict with Articles V and XIV of Amendments to the Constitution of the United States, and seek to enjoin the defendants from taking possession of the plaintiffs' properties condemned. The allegations in all the bills are similar and substantially the same, except that in the Scituate Light & Power Company bill there is no allegation of interest as a tax-payer of Providence, and except that the Theresa B. Joslin bill does not allege the matters in paragraph "57" *infra*.

THE ALLEGATIONS OF UNCONSTITUTIONALITY.

The relevant allegations claiming violations of said Articles of the United States Constitution, contained in the Joslin Manufacturing Company bill, are as follows:

> "52. That your orator is advised, and on information and belief avers, that said act is unconstitutional and void, in that it violates the provisions of Articles V and XIV of Amendments to the Constitution of the United States, in that under its provisions your orator and the other owners are deprived of their property without due process of law, without remedy by recourse to the laws, conformably to the laws, or by the law of the land, in that their property is allowed to be taken for a public use without just compensation, and also in that their property is allowed to be taken under color of eminent domain by the City of Providence acting under said act, when questions of the necessity of the taking as a whole or of the taking of the various parcels which are taken have not been decided by the legislature itself but have been relegated to the City of Providence to decide *ex parte*, without appeal and without an opportunity to have said questions heard and decided by any impartial tribunal.

"53. And your orator says in connection herewith that, as a matter of fact, the taking of your orator's property is not necessary to the purposes of said act, but that said City could obtain from said north branch of the Pawtuxet River an abundant supply of pure water for its purposes, far more readily, and at a very small portion of the cost of the present plan, without disturbing any portion of your orator's property and without disturbing the other mills, mill villages and business portions of the town taken under the present plan of condemnation, and that, even with the reservoir and dam constructed under the present plan, none of your orator's mills are flooded out, with the one exception of the mill at Richmond, and that the taking of all your orator's other mills and mill villages is uncalled for and unnecessary, and that it has not had and does not have under said act any opportunity to raise this question or have it passed on by any impartial tribunal.

"54. And your orator further says that it is advised, and therefore on information and belief alleges, that said act is unconstitutional and void, in that it violates all the foregoing provisions of the Constitution of the United States in the particulars mentioned, in that it permits said City of Providence to take the possession and use of your orator's property, and to rent, sell and dispose of the same, not only without offering any compensation therefor or having any compensation therefor permanently or tentatively determined, (the whole question of proceedings to have such damages determined being left as a burden upon your orator, in default of whose action said City may take said properties on its own terms or, so far as appears by said act, without any compensation therefor,) but, also, said City is allowed to take possession of all of said properties and to dispose of the same, not only without paying for the same or having any value thereof determined, but also, at a time when the same is not required for the purpose of said act and may never be required therefor, the need of said premises by said City being dependent upon the complete or permanent construction of the dam at Kent, the completion of which as aforesaid will in all probability be long deferred and by possibility may never occur. And your orator avers that the question of the taking of said property for a prospective or possible need of the City is left by said act wholly to said water board, representing said City of Providence to decide

ex parte without any opportunity for an appeal or for the hearing and determination of the question by any impartial tribunal.

"55. And your orator says that it is advised, and therefore on information and belief avers, that said act is unconstitutional and void, in that it violates the provisions aforesaid of the Constitution of the United States in the particulars aforesaid, in that it permits the taxpayers of said City of Providence to be burdened by a large and unnecessary expenditure and by an expenditure which is not wholly for the benefit of said City of Providence but in part for the benefit of other municipalities or companies outside of the City of Providence which do not contribute to any portion of the expenditure for said water supply.

"56. Your orator avers it is a large taxpayer in said City of Providence and is interested in the aforegoing questions as such taxpayer as well as a person whose property is taken under said act, and that in neither capacity has it any appeal from the *ex parte* decision of the representatives of said City of Providence in determining upon the making of said expenditure and upon the taking of land and property by the City of Providence and at its sole expense under the color of eminent domain, but for the benefit of other communities than the City of Providence, and that there has been and is now no opportunity for said questions to be considered and determined by any impartial tribunal.

"57. Your orator further says that it is advised, and therefore on information and belief avers, that said act is unconstitutional and void, in that it violates said Articles V and XIV of Amendments to the Constitution of the United States by denying to persons within the jurisdiction of said State of Rhode Island the equal protection of the laws, in that it permits the owner or owners of business located on land situated in said Town of Scituate or on said branch of the Pawtuxet River and established prior to the passage of said act, which is directly or indirectly damaged or decreased in value by reason of the acquisition or taking by said City under said act of any land or lands or the acquisition, taking or diverting of any waters of said branch of the Pawtuxet River or any waters tributary thereto under the provisions of said act, to claim and recover just compensation for such damage or decrease in value, but does

not allow the owner or owners of any such business so situated, but which was not established at the time of the passage of said act but was established before the said City took any action under said act to acquire or take any land or waters thereunder, to recover any such compensation for such damages or decrease in value; and also, in that, while it allows any mill owner whose mill is situated on land taken by the City of Providence under said act to recover the reasonable expense and cost of moving his machinery from the old location at said mill to a new location within the New England states, it does not allow a mill owner similiarly situated, whose land and mill are taken, to recover any portion of the reasonable expense of moving said machinery to any location without said New England states, irrespective of the needs of his business or the desirability or necessity of such new location or the cost of such moving. And your orator says there are numerous cases of business established in good faith within said area after the passage of said act but before the condemnation of land by the City of Providence, and that there is at least one case where it becomes reasonably necessary and proper that the machinery should be removed from the mill where it was located to a new location in the State of New York."

SECTIONS OF SAID ACT INVOLVED IN THE CONSTITUTIONAL QUESTIONS.

By the provisions of Section 1 of said Act, a Board of Commissioners, consisting of seven persons, is established as the Water Supply Board of the City of Providence.

Section 3 provides as follows:

"Sec. 3. Said board, as soon as may be, shall investigate and determine as to whether a part of the north branch of the Pawtuxet river, and the water shed tributary thereto, would be the most available and desirable source for a supply of pure and wholesome water for the city of Providence and for any territories now supplied, or hereafter supplied under the provisions of this act, by means of the waterworks of said city, and if that source is approved, said board shall

proceed to make a plan, locating a storage reservoir or reservoirs on and adjoining said branch of said river, including any tributaries of said branch, and an aqueduct to carry water from such reservoir or reservoirs to the waterworks of said city at Sockanosset, and said board at any time may change or modify such plan or any amended plan."

Section 5 provides in part as follows:

"Sec. 5. Said city of Providence is hereby authorized from time to time and in the manner hereinafter provided to acquire by condemnation any lands, improved or unimproved, and any estates, easements, rights and interests in any lands, which are included within the area enclosed by the boundary line colored red on the accompanying plat marked 'Plat of lands enclosed by red lines hereon, mostly in the town of Scituate, which may be taken by the city of Providence for water supply purposes, Samuel M. Gray, civil engineer, 1915,' a plat of part of said line at North Scituate being also shown on the accompanying supplementary plat, entitled 'Map showing location of condemnation line at and near North Scituate, Samuel M. Gray, civil engineer, 1915,' and which the city council of said city deems necessary for the location, construction, maintenance and operation of a reservoir or reservoirs and any dams, sluices, culverts, water and land ways, and works connected therewith or incidental thereto, and also any lands and any estates, easements, rights and interests in any lands within said area which said city council deems necessary for protecting and preserving the waters in such reservoir or reservoirs and the waters of said river branch and its tributaries flowing thereto from pollution and from the deposit therein of any matters which would reduce the quality or value of any of such waters as a potable water supply, and for filtration and other works for treating such water supply, and for carrying out the purposes, directions and requirements of this act, and also any lands, and any estates, easements, rights and interests in any lands, which said city council deems necessary for the location, construction, maintenance and operation of an aqueduct in a strip of land from such reservoir or the lower of any such reservoirs to said water works at Sockanosset, not to exceed two hundred (200) feet in width, and for ways to such strip of land from the nearest public highways, and for executing the work at, adjoining

or near the portals and shafts of any tunnel construction designed as part or parts of such aqueduct, including removing and disposing of surplus earth and other materials. Said city may take any such lands in fee simple or any estate, easement, right or interest in any such lands absolutely, except as hereinafter provided.

"Upon the passage of this act, said plats shall be kept on file in the office of the secretary of state. Said boundary line enclosing said area is described as follows:" * * * (Description of area enclosed by red boundary line.)

Section 6 provides in part as follows:

"Sec. 6. Said city of Providence is hereby authorized from time to time and in the manner hereinafter provided to acquire absolutely by condemnation, the waters of said branch of said river and its tributaries, or any part or parts thereof, included within said area shown within red lines on said plat, and any water or flowage rights or privileges appurtenant to or connected with said area or any part or parts thereof, and any waters flowing into such reservoir or reservoirs, and to there hold such waters and to appropriate and divert the same for such water supply: Provided, however, that said city shall not hold or divert any such waters until such a reservoir or reservoirs is or are ready for use;" * * * (Certain further provisions limiting the amount of water to be diverted for the water supply and requiring the discharge from the reservoir of certain quantities of water for use particularly of the mills on the river below the reservoir.)

Section 7 provides that, in case a part within said area of any farm, lot, or tract of land is taken and the remaining portion, whether or not within said red boundary line, is damaged or lessened in value thereby, the owner or owners may surrender to the city of Providence the portion so damaged or lessened in value. It is further provided in this section that all reservoirs, dams, sluices, culverts, waterways and works connected with or incidental to a mill taken under the Act, whether or not the same be within said red boundary line, may be surrendered to the city of Providence by giving written notice within one year after such taking, and there-

upon said city shall be liable to pay and the owner may recover just compensation for the same in proceedings for damages for land taken under the Act.

Section 12 provides in part as follows:

"Sec. 12. In case any land included in said area shown within red lines on said plat or elsewhere in said town of Scituate has a mill thereon, which is taken hereunder, the owner or owners of such mill may surrender to said city of Providence the machinery in use or set up in such mill at the time of such taking by giving to said board or other authorized representative or representatives of said city, or the city council thereof, within six months after such taking written notice of its surrender of the same to said city, whereupon said city shall be liable to pay for the machinery as surrendered and actually delivered to said city the fair value of the same at the time of such delivery, as part of the damages for such taking. * * *

"In case said owner does not surrender such machinery to said city, said city shall pay to him, as a part of his damages for the taking of said mill, the reasonable expense and cost of removing such machinery from its old location at said mill to a new location within the New England States, and of setting up such machinery in the place therein in which it is to be used by said owner. The amount of such reasonable cost and expense, if not agreed upon by the parties, shall be determined in the same manner as is provided herein for the determination of damages for the taking of lands, or interests, or rights therein."

Section 16 provides in part as follows:

"Sec. 16. The owner or owners of any business located on land situated in said town of Scituate or on said north branch of the Pawtuxet river and established prior to the passage of this act, which is directly or indirectly damaged or decreased in value by reason of the acquisition or taking by said city hereunder of any land or lands or the acquisition, taking or diverting of any waters of said north branch of the Pawtuxet river or any waters tributary thereto under the provisions of this act, shall have the right to claim and recover just compensation for such damage or decrease in value." * * *

Section 18 provides as follows:

"Sec. 18. Said town of Scituate, the city of Cranston, and each water or fire district therein now or hereinafter incorporated, and each other town, city or water or fire district now or hereafter incorporated having any of its territory included in the drainage district of said north branch of said Pawtuxet river, or of the drainage district of said Pawtuxet river below the junction of the north and south branches of said river, shall have the right to take and receive water from said storage reservoir or reservoirs, said aqueduct or the reservoir of said city at said Sockanosset, for use for domestic, fire and other ordinary municipal water supply purposes in the town of Scituate or the city of Cranston, or such water or fire district therein, or in any part or parts of such territory or territories of such other town, city or water or fire district as are included in either of said drainage districts where there is no public water supply being furnished by any public or *quasi* public body or corporation at the time such town, city or water district decides to take such water. The town of Warwick or any water or fire district therein shall have the further right to take and receive water as aforesaid for use as aforesaid in any part of its territory lying easterly of the New York, Providence and Boston railroad line of the New York, New Haven and Hartford Railroad Company and northerly of Greenwich bay, where there is no public water supply being furnished as aforesaid. Proper connections with said water supply source or sources, including the installation of proper meters or other devices for ascertaining the quantity of water so taken, shall be made at such suitable location or locations as shall be approved by the officer or officers in charge of the water works of said city of Providence, and at the expense of the town, city or district desiring to take such water, and subject to such reasonable rules and regulations as from time to time may be made by said city of Providence or its duly authorized officer or officers in charge of its water works. Such town, city or water or fire district shall have the right to take such water as aforesaid to any extent each month not exceeding an average per day of one hundred gallons per capita of the number of inhabitants of such parts of its territory or territories as are served from such water supply source or sources, as such number of inhabitants was shown

by the last preceding census of the United States or of the State of Rhode Island, unless and to the extent and for the time only that said officer or officers of said city of Providence shall consent to the taking by such town, city or water or fire district of a greater quantity of such water. Such town, city or water or fire district shall pay to said city of Providence such fair wholesale rates or charges for the quantity of water taken by it as aforesaid, and at such times, and the rates fixed to continue during such periods, as may be mutually agreed upon, or in default of agreement as shall be determined by three arbitrators, one to be chosen by it, one by said city of Providence and the third by the two so chosen, or in case either party should refuse or neglect to appoint such arbitrator, or in case the two arbitrators chosen by the parties should refuse or neglect to appoint the third arbitrator, said superior court for Providence county, upon petition of either party and after giving the other party opportunity to be heard, shall appoint such arbitrator or such third arbitrator as the case may be. Said city of Providence may furnish water from such water supply source or sources to any incorporated water company for use as aforesaid in any territory included in either of said drainage districts, where at the time of beginning to furnish such water there is no public water supply, whether by a public or *quasi* public body or corporation other than the water supply of such water company, in any part of the territory that is supplied by such water company, or for use as aforesaid in said territory in Warwick easterly of said railroad line and northerly of said Greenwich bay."

Section 21 provides as follows:

"Sec. 21. Said city from time to time may lease any of its lands acquired by purchase or condemnation hereunder, which are not required for such reservoir or reservoirs or other works, but are held to protect and preserve the waters thereof and the waters of said river branch and its tributaries from pollution, for such consideration or rent and upon such terms and conditions, including especially any restrictions upon the use of such leased lands and any buildings or improvements thereon, to prevent any such pollution, as may be prescribed by said board or authorized representative or representatives of said city or by the city council thereof, and until otherwise provided by said city council said board in its discretion and in the

name and behalf of said city may make any such leases: Provided, that every such lease shall contain a condition providing in substance that if any occupation or manner of use of any such leased lands or any buildings or improvements thereon, causes, or in the opinion of said board, such representative or representatives or said city council is liable to cause, any such waters to be polluted, said board, such representative or representatives or said city council may at any time terminate such lease by giving the lessee or lessees at least thirty days prior notice of such termination in writing. The lessee or lessees shall quit the premises at the time fixed in such notice, or shall be liable to be dispossessed thereof in any lawful manner or by means of any legal action the same as other tenants holding over their terms. Nothing herein shall be construed to deprive said city of any injunctive remedy to prevent any such pollution or threatened or impending pollution of any of such waters."

Section 23 provides that relative to every taking by the city of Providence under this Act of any lands or water rights, said water board or other authorized representatives of said city shall prepare and submit a description, plat, and list of the owners, of such lands and water rights as are proposed to be taken to the city council of Providence for its action on such proposal; and that whenever the city council shall pass any resolution to take any lands or water rights, it shall cause to be filed in the office of the town or city clerk of each town or city in which the same lie a statement containing a description of the lands and water rights taken and the purpose or purposes for which taken and also a plat of such lands; and that upon the filing of such statement and plat, the title to the lands and water rights taken shall vest in fee simple in the city of Providence, except where a lesser estate or interest is specified. It is expressly provided, however, that actual possession of such lands, estates or water rights shall not be taken, unless with the consent of the owner or owners, until after the expiration of one year from the date of filing the required statement and plat.

It is further provided in this section as follows:

"Sec. 23. * * * Any owner of, or person entitled to or interested in, any such land or lands or any such estate, easement, right or interest in any such land or lands or any such waters or water rights or privileges so taken who shall not agree with said city of Providence upon the price of his land or lands or his estate, easement, right or interest in such land or lands or his waters or water rights or privileges so taken, may within one year after personal notice of said taking, or if he have no personal notice may within two years from the date of such filing of such statement and plat or statement apply by petition, to the superior court within and for the county of Providence, or the county in which the land or any part thereof taken or damaged as aforesaid by such taking is situated, setting forth the taking of his land or lands or his estate, easement, right or interest in such land or lands or his waters or water rights or privileges, and praying for an assessment of damages by a jury. Upon the filing of said petition, said court shall cause twenty days' notice of the pendency thereof to be given to said city by serving the mayor of said city with a certified copy thereof, and may proceed after such notice to the trial thereof, and such trial shall determine the damages by him sustained by such taking of his land or lands or his estate, easement, right or interest in such land or lands or his waters or water rights or privileges, and including any lands, works and machinery surrendered by him to said city under the authority of this act, and in case of such town or district any furniture or building equipments surrendered by it to said city under the authority of this act, and in case of said Providence & Danielson Railway Company, its successors and assigns, all their said damages, and judgment shall be entered upon the verdict of such jury and execution shall be issued against said city therefor, and such trial shall be conducted in every respect as other civil cases are tried, including the right to except to rulings and apply for new trial for cause. In case of conflicting claims to any such land or lands or to any estate, easement, right or interest in any such land or lands, or to any waters or water rights or privileges, so taken, by any two or more such petitioners, said court may set down the petitions of such petitioners for trial at the same time by the same jury, and may frame all necessary issues for the trial thereof.

"In case any owner of, or person having any estate, easement, right or interest in, or interested in, any such land or lands or such estates, easements, rights or interests in land or lands, or such waters or water rights or privileges so taken, shall fail to receive personal notice of the taking thereof, and shall fail to file his petition as provided herein, said court in its discretion may permit the filing of such petition subsequent to said period of two years from such filing of such statement and plat or statement: Provided, that such owner or person shall have had no actual knowledge of such taking in season to file such petition and provided that said city of Providence, after such filing of such statement and plat or statement, shall not have paid any other person or persons claiming to own such land or lands or such estate, easement, right or interest in land or lands, or such waters or water rights or privileges the price or value of the same, or shall not be liable to pay for the same under any judgment rendered against said city under the provisions of this act.

"Instead of claiming an assessment of damages by jury as above provided, any such owner or person may, within the time hereinbefore prescribed for claiming such assessment, apply to the superior court for the county of Providence for the assessment by a commission of such damages as such owner or person sustained by such taking; and said court may from time to time appoint a disinterested commission or commissions, as it shall deem necessary, to hear and determine such applications. A person who is a resident or taxpayer in the city of Providence shall not thereby be disqualified from acting as such a commissioner in any case in which the person or corporation applying for assessment of damages shall not object to such person. Any commission so appointed shall hear and determine such petitions as are referred to it by said court, and shall, as soon as it arrives at an award, report each of the same to said court, which shall fix the time for hearing any objections thereto. If there are no objections to such award, the court shall confirm the same; if objections are filed to such award, the court shall proceed to hear the same, and may confirm said report or refer the same for a new or further hearing to the same or another commission, or may itself fix the amount of the award, as in its judgment shall be in accordance with the rights and equities of the parties. In all cases, any party in interest shall have the same right to an appeal from the

decision of the court as is provided by law in equity causes determined by decree of said superior court. Upon the final determination of the amount of the damages awarded as aforesaid, execution shall issue in favor of the petitioner and against said city therefor. The compensation and expenses of each such commission shall be paid by said city as and when allowed by said court." * * *

Section 25 provides in part as follows:

"Sec. 25. * * * When said board for said city takes actual possession of any land or lands acquired by purchase or condemnation hereunder, it may sell, dispose of and cause to be removed any buildings or improvements thereon which would obstruct the work hereunder or should be removed to accomplish the purposes hereof; and in settling any claims for damages for any lands or land taken hereunder, said board may agree that any such buildings or improvements may be removed by the owner or owners from whom the same were taken in part satisfaction of such damages, but within such express time as will not impede any such work or materially delay the accomplishment of such purposes. Relative to any such sales, said board in the name and behalf of said city may give to the purchaser a bill of sale of the property sold. All sums of money received by said board from any such sales shall be forthwith paid into the treasury of said city."

Section 28 provides that the exercise of the power of eminent domain conferred upon the city of Providence by the Act, shall be exercised by the said city within the period of two years from and after the date of the passage of the Act and not thereafter.

PART ONE.

ISSUE.

Does Article V of Amendment to the Constitution of the United States conflict with said Act?

PART TWO.

ISSUES.

Does Article XIV in Amendment of the Constitution of the United States conflict?

1. With the provisions of said Act creating a Board of Commissioners, directing said commissioners to determine as to whether a part of the north branch of the Pawtuxet River and the water shed tributary thereto would be the most available and desirable source for a supply of pure water for the city of Providence and for any territories now supplied, or hereafter supplied, under the provisions of said Act, by means of the water works of said city, and, if such source be approved, authorizing the city of Providence to acquire by condemnation any lands, estates and interests in lands within the area defined and as limited in and by Section 5 of said Act, and waters and water rights and privileges within the area specified and as limited in and by Section 6 of said Act, and any lands or easements therein without such area for the highways and railroad relocation required or authorized to be laid out or furnished by said city in and by Section 8 of said Act, and all in the manner prescribed in and by Section 23 of said Act?

(This issue relates particularly to the complainants' claim that the legislature, or a subdivision of the state by authority of the legislature, cannot determine the reasonable necessity and extent of the taking, and that the same must be determined by a judicial tribunal.)

2. With the provisions of Section 23 of said Act vesting title to the lands, estates, waters and water rights taken, in the city of Providence on the filing of the statement and plat specified in said section, and authorizing said city to take actual possession thereof after one year from the filing of such statement and plat, or after three months therefrom in case of any strips of land taken for the roadways or rail-

road relocation, and providing that, in case any owner shall not agree with said city upon the price of his property so taken, he may within a specified time petition the superior court for an assessment of damages by a jury or a commission, and directing, upon the final determination of the damages by a jury or a commission, that execution therefor issue against the city of Providence in favor of the petitioner, the expense of any such commission to be borne by the city of Providence?

3. With the provision of Section 21 of said Act, authorizing the city of Providence to lease, subject to the conditions specified therein, any lands acquired under said Act which are not required for reservoir purposes, but are held to protect and preserve the water supply from pollution?

4. With the provision of Section 25 of said Act authorizing the city of Providence to "sell, dispose of and cause to be removed any buildings or improvements thereon (lands acquired by purchase or condemnation under the Act) which would obstruct the work hereunder or should be removed to accomplish the purposes hereof"?

5. With the provision of Section 18 of said Act, giving to certain municipal corporations and water and fire districts therein, other than the city of Providence, the right to take and receive water from the water supply on the terms and conditions therein specified, or with the provision permitting the city to sell water to water companies located within the drainage area?

6. With Section 16 of said Act, permitting the owner of a business established prior, but not subsequent, to the passage of said Act to recover direct or indirect damages to such previously established business, caused by the taking of lands, estates, waters and water rights under said Act;

7. With Section 12 of said Act, allowing the owner of a mill taken thereunder, who has not surrendered the ma-

chinery of such mill to the city of Providence pursuant to the provisions of said section, to recover the reasonable cost of removing such machinery from its old to a new location within, but not without, the New England States, and of setting up such machinery in the place therein in which it is to be used by such owner?

8. With the power of the legislature to grant such a franchise subject to the conditions and the requirements of compensation for consequential damages?

PART ONE.

Article V of Amendment to the Constitution of the United States Does Not Conflict with Said Act.

The State by said Chapter 1278 of the Public Laws of Rhode Island authorizes a taking by one of its municipal subdivisions. Therefore said Act can be called in question only under such constitutional provisions as are restrictions upon the State Government or its subdivisions. It has been held generally that said Fifth Amendment restrains the power of the Federal Government only and is not a limitation upon the power of the States.

In *Barron* v. *Baltimore* (1833), 7 Pet. 243, 247, 250; 8 L. ed. 672, 674, 675, the Supreme Court speaking through Chief Justice Marshall said:

> "The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limita-

tions on power, if expressed in general terms, are naturally and, we think, necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments framed by different persons and for different purposes. If these propositions be correct, the Fifth Amendment must be understood as restraining the power of the general Government, not as applicable to the states.—These amendments demanded security against the apprehended encroachments of the general Government, not against those of the local governments. In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in Congress, and adopted by the states. These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them."

In *Twitchell* v. *Pennsylvania* (1869), 7 Wall. 321, 325; 19 L. ed. 223, 224, Chief Justice Chase said:

"But the scope and application of these amendments are no longer subjects of discussion here."

In *U. S.* v. *Cruickshank et al.* (1875), 92 U. S. 542; 23 L. ed. 588, 591, Chief Justice Waite said that the first ten amendments were not intended to limit the powers of the State governments, and that, "It is now too late to question the correctness of this construction."

Kelly vs. *Pittsburg* (1881), 104 U. S. 78; 26 L. ed. 658, 659.

"As regards the effect of the 5th Amendment of the Constitution, it has always been held to be a restriction upon the powers of the Federal Government and to have no reference to the exercise of such powers by the state governments. See *Withers* vs. *Buckley*, 20 How. 90 (61 U. S. XV, 819); *Davidson* vs. *New Orleans*, 96 U. S. 97 (XXIV, 616)."

In *Fallbrook Irrigation District* v. *Bradley* (1896), 164 U. S. 112, 158; 41 L. ed. 369, 388, the court said:

"There is no specific prohibition in the Federal Constitution which acts upon the states in regard to their taking private property for any but a public use. The 5th Amend-

ment which provides among other things, that such property shall not be taken for public use without just compensation, applies only to the Federal government as has many times been decided. *Ex parte Spies*, 123 U. S. 131 (31:80); *Thorington* vs. *Montgomery*, 147 U. S. 490 (37:252)."

See also

Spies vs. *Illinois* (1887), 123 U. S. 131; 31 L. ed. 80, 86.

Brown vs. *Walker* (1896), 161 U. S. 591, 606; 40 L. ed. 819, 824.

Brown vs. *New Jersey* (1899), 175 U. S. 172, 174; 44 L. ed. 119, 120.

Twining vs. *New Jersey* (1908), 211 U. S. 78, 93; 53 L. ed. 97, 103.

Joslin Manufacturing Co. vs. *Providence*, Transcript of Record, p. 99.

It is apparent from the above decisions that no real constitutional issue can be raised relative to the validity of said Act under said Fifth Amendment to the Constitution of the United States.

PART TWO.

ISSUE I.

The Provisions of Said Act, Authorizing the City of Providence to Condemn Lands and Water Rights Within the Definite and Limited Area Fixed by the Legislature in the Act, by Action of the City Council of said City After the Proposed Taking in Detail Has Been Presented to It by Said Water Supply Board, Are in Accord with the Fourteenth Amendment to the Constitution of the United States.

The provisions of said Act, creating a Board of Commissioners to investigate and determine whether a part of the north branch of the Pawtuxet river be the most available and desirable source for a supply of pure water for the city of

Providence and, if such source be approved, authorizing the city of Providence to acquire by condemnation lands and water rights within the definite and limited area and on the terms and conditions set forth in Sections 5, 6 and 23 of said Act, are in accord with the established legislative practice of Rhode Island and other States (See Appendix, Part Three, p. 23), and do not violate said Fourteenth Amendment.

Under this head consideration will be given to the objections raised by the bills of complaint against the methods provided in the Act for determining the necessity and the extent of the taking authorized thereby, and the objections to the results of such methods in so far as they affect any interests of the complainants.

As a matter of convenience, the respondents here state certain explanatory and relevant propositions on which they rely, which propositions will be amplified and supported by authorities in the succeeding discussion:

(a) The taking authorized by the Act was for a public use.

(b) Where the taking is for a recognized public use, all matters of judgment as to the necessity for the taking and as to the extent of the taking are for the legislature to determine, and not for the courts.

(c) The legislature may delegate to a municipality the power to determine the necessity for, and the extent of, the taking.

(d) A city in exercising public powers conferred upon it, is not a judge in its own cause, notwithstanding its interest in the proceedings.

(e) Property owners are not entitled to a hearing on the question whether their lands may be included within the area taken.

(f) Under the Act before the court, the legislature itself substantially determined the question of necessity.

A careful examination of the bills of complaint in these causes will disclose that the complainants in no way question the city of Providence's need of a new and increased water supply, and in no way question that the establishment of a water system for fire and general domestic uses is in law a "public use," as is universally held.

The issue as raised by the complainants concedes that the taking authorized by the Act is for a "public use." But the complainants differ with the legislative branch of our state government and the agencies established by it, on the question of how much should be taken, where it should be taken and when it should be taken. It is submitted that in the absence of obvious and gross abuse of authority, this is purely a legislative and not a judicial question. In the absence of such abuse, the complainants concede the only issue in this connection that could properly be passed upon by this court. It is true that the complainants allege an excessive and unnecessary taking, although the legislature has not in this case, as in many cases, given a general authority to condemn, but the legislature has itself passed upon this question by fixing a definite area, beyond or not related to which the city cannot condemn any lands or rights, and by giving to the city full authority to acquire by purchase and condemnation all within this area. The only discretion vested by the state in the city authorities is to take less than the legislature has authorized. The legislature has decided how much land and what waters may be regarded as necessarily and properly taken. It has imposed upon the Water Supply Board the duty of preparing the preliminary details and the responsibility of recommending to the City Council as to what lands and water rights within or relating to the prescribed area should be taken, and the City Council, in passing upon the necessity of the taking could not exceed

the limitations of the authorized taking, but might reduce the extent of the taking, and, as will appear from an examination of the area authorized in the Act to be taken and the area taken under the Statement of the taking which is set forth as Exhibit A in the complainants' bills, Transcript of Record p. 39, the City Council, although taking most, did not take all the lands included in said area. Surely, the determination by the appointed authorities to refrain from exercising the full authority vested in them by the Act cannot be regarded as an obvious and gross abuse of discretion or as an objectionable *"ex parte"* decision, and what was so expressly authorized to be done should be regarded the same as if done by the legislature itself directly.

Although a few courts have confused and failed to recognize the distinction between determining whether a given taking was for a public purpose, which is a judicial function, and the determination of questions of fact as to the proper location for public works, what property should be taken therefor, and when the same should be established, which are political or legislative questions, still the nearly unanimous decisions of the English and American courts and text book writers recognize this distinction. And it is also well established law that whether the legislature determines these questions of fact itself, or whether it delegates the authority and responsibility of making these determinations to a subdivision of the state or its other agencies, the nature and character of the determination remains the same. Nothing is better settled in the law than that a state legislature may delegate to municipal or private corporations or even individuals, the authority to exercise the power of eminent domain for the purpose of appropriating private property for public use, and, given that the use is a public one, the expediency or the necessity, in the absence of gross abuse or bad faith, of exercising that power will not be inquired into by the courts.

The aforegoing stated rules of law have been established

by decisions of this Court, and such are the rules of law as recognized by the leading text writers on the subject, and as supported by an overwhelming weight of Court decisions generally, as is to be seen in the Appendix hereto, Part One, p. 1.

Obviously, the reason for the existence and the purpose of the power of eminent domain would be largely defeated if, in establishing a large public enterprise, the condemnor should be obliged to litigate before judicial tribunals the question of the necessity of the taking. The furnishing of a public necessity would be unreasonably delayed, if in case of a condemnation each property owner could litigate the necessity of appropriating his particular property, even though in a given case its use be indispensable and be immediately required for carrying on the public work.

It necessitates no undue speculation to foresee that, if the doctrine contended for by the complainants (namely, that the question of the necessity of taking their properties was one for the courts to pass upon), were to be recognized by this court, it would encourage, not only in the present enterprise but also in the case of establishing other large public works, property owners to litigate the question for the sole purpose of compelling the municipality to agree upon an unreasonable price for their properties, rather than submit to the delay. It requires but a superficial consideration of the nature and public importance of the power of eminent domain to appreciate how incompatible with that power would be the doctrine for which the complainants contend.

In *Adirondack Ry. Co.* vs. *People of the State of New York* (1899), 176 U. S. 335; 44 L. ed. 492, Chief Justice Fuller, speaking for the Court, said:

> "The general rule is that the necessity or expediency of appropriating particular property for public use is not a matter of judicial cognizance, but one for the determination of the legislative branch of the government, and this must obviously be so where the state takes for its own purposes.

> The state possesses the power as a sovereign, and as a sovereign exerts it. How can its citizens call on the courts to review the grounds on which the state has acted in the absence of legislation permitting that to be done?"

Again, in *United States* vs. *Gettysburg Electric Ry. Co.* (1895), 160 U. S. 668, 685; 40 L. ed. 576, 582, the Supreme Court, in passing upon the matter of establishing a monument, preserving the land and marking the scene of the battle of Gettysburg, held that the appropriation of land for such a purpose was for a "public use" and said:

> "The use for which the land is to be taken having been determined to be a public use, the quantity which should be taken is a legislative and not a judicial question."

In *Home Telephone, etc., Co.* vs. *Los Angeles* (1908), 211 U. S. 265; 53 L. ed. 176, it was held that a city in exercising public powers conferred upon it, is not a judge in its own cause, notwithstanding its interest in the proceedings.

United States vs. *Chandler Dunbar Co.* (1912), 229 U. S. 53, 65; 57 L. ed. 1063, 1076.

Backus Jr. & Sons vs. *Fort St. Union Depot Co.* (1897), 169 U. S. 557; 42 L. ed. 853.

Shoemaker vs. *United States* (1892), 147 U. S. 282, 298; 37 L. ed. 170, 184.

Baltimore Boom Co. vs. *Patterson* (1879), 8 Otto 403, 406; 25 L. ed. 206, 207.

Monogahela Nav. Co. vs. *United States* (1892), 148 U. S. 312; 37 L. ed. 922.

District of Columbia vs. *Washington Steel & Ordnance Co.* (1915), 43 D. C. Appeals, 344, 349.

> "The Act declares in plain and unambiguous language that the land is to be condemned 'for a public highway and for park purposes'. This being a public use, the court will not inquire into either the necessity or expediency of the exercise of the right of eminent domain, since these questions are purely for the legislative branch of the government. *Baltimore Boom Co.* v. *Patterson*, 98 U. S. 403, 25 L. ed. 206; *Shoemaker* v. *United States*, 147 U. S. 282, 37

L. ed. 170, 13 Sup. Ct. Rep. 361; *United States* v. *Gettysburgh Electric R. Co.* 160 U. S. 668, 40 L. ed. 576, 16 Sup. Ct. Rep. 427."

The case of *Sears* v. *City of Akron* (1918), 246 U. S. 242, 251; 62 L. ed. 688, 698, an appeal from the District Court for the Northern District of Ohio, is definitely in point, and evidently is determinative of the questions here under consideration.

As seen in the Transcript of Record, No. 25142, filed February 19, 1916, pages 15, 16, the bill in this case alleged that Section 3679 of the Ohio Code, which delegated to municipal corporations a general power to condemn for water supply purposes, violated the Fourteenth Amendment to the United States Constitution "in that it authorizes a taking of private property by a municipality without any determination of the necessity for such taking other than the determination of the Council of such municipality, which determination is made without any hearing and without the owners of such property having an opportunity to be heard; and the defendant herein, under color of authority of said statute, is now proceeding to take private property upon its own determination of the necessity of such taking when no such necessity in fact exists;—"

The bill further alleged, Transcript, p. 17-20, that only fifteen per cent. of the water taken could be applied to any legitimate public use within the next thirty-five years; that there was no necessity for the taking; that the taking was in bad faith and fraudulently for the benefit of others than the public, and that the City was without funds and unable to pay the compensatory damages. But Judge Clarke dismissed the bill, holding as to the insolvency and fraud allegations that they were merely conclusions of the pleader without facts being stated to support them.

On appeal this Court confirmed the decree appealed from, and through Justice Brandeis said:—

"Fourth: Plaintiff contends that the ordinance is void because the general statute which authorized the appropriation violates both Article I, Section 10 of the Federal Constitution and the Fourteenth Amendment, in that it authorizes the municipality to determine the necessity for the taking of private property without the owners having an opportunity to be heard as to such necessity; that in fact no necessity existed for any taking which would interfere with the company's project; since the city might have taken water from the Little Cuyahoga or the Tuscarawas rivers; and furthermore that it has taken ten times as much water as it can legitimately use. It is well settled that while the question whether the purpose of a taking is a public one is judicial; *Hairston* vs. *Danville & Western Railway*, 208 U. S. 598; the necessity and the proper extent of a taking is a legislative question. *Shoemaker* vs. *United States*, 147, U. S. 282, 298; *United States* vs. *Gettysburg Electric Ry. Co.*, 160 U. S. 668, 685. *United States* vs. *Chandler-Dunbar Co.*, 229 U. S. 53, 65. The legislature may refer such issues, if controverted, to the court for decision. *P. C. C. & St. L. Ry Co.* vs. *City of Greenville*, 69 O. S. 487."

The decision in Sears v. Akron was followed in *Bragg* v. *Weaver*, (1919), 251 U. S. 57, 58; 64 L. ed. 135, 137, where the Court by Justice Van Devanter said: —

"Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the state may designate. They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential in due process in the sense of the 14th Amendment."

In *Joslin Manufacturing Company* v. *Clarke, City Treasurer*, (1918), 41 R. I. 350, 359, which, with the cases of the Scituate Light & Power Company and Theresa B. Joslin included in the same decision, were cases between the same parties and included the same subject matters, and the same allegations of violation of said 14th Amendment as in the cases at bar, the Court pointed out the striking similarity in many respects between the Sears v. Akron case and the cases before the Rhode Island Court, and held that

the Sears v. Akron case gave a conclusive answer to the principal contentions of the complainants. See a copy of this decision in the Appendix hereto, Part Four, p. 49.

It is therefore submitted that, on both principle and authority, the objections raised by the complainants in their bills in respect to the method provided by said Act for determining what properties should be taken for effectuating the purposes of said Act, are objections sounding in neither reason nor law. The protest may be that of unwilling sellers, but it is to meet such a condition that the power of eminent domain exists.

The cases relative to this issue, cited by the plaintiffs in error, either do not seem to be in point or have been overruled. See Appendix Part One p. 12.

ISSUE 2.

The Provisions of Section 23 of Said Act Provide for Due Compensation for Property Taken, and Do Not Violate Said Fourteenth Amendment.

Independent of any constitutional guarantees it has generally been held that just compensation must be made for private property taken for public use. The general provision, therefore, to the effect that "private property shall not be taken for public use without just compensation," which is found in the Constitution of Rhode Island and most of the states in the northeastern part of the United States, and the similar restriction on the states involved in the "due process" clause of said 14th Amendment, are but declaratory of a property owner's rights under the law of eminent domain as it has long existed.

The Act in question provides in Section 23 that title to the lands and water rights condemned shall vest in the city of Providence upon the filing of the statement and plat specified in this section, and authorizes the city to take

actual possession after one year from the filing of such statement and plat, and provides that notice be given to the land owners, and that in case the owner shall not agree with the city upon the price for his property, he may, within one year after personal notice of the taking, or within two years if he has no personal notice thereof, petition the Superior Court for an assessment of damages by a jury or commission, and directs that execution shall issue against the city of Providence in favor of the petitioner upon the final determination of the damages, the expenses of any such commission to be borne by the city of Providence.

Does this adequately provide for due compensation within the meaning of a general constitutional restriction, such as contained in said Fourteenth Amendment?

In *Cooley's Constitutional Limitations*, 7th ed., p. 813, appears the following statement of the law:

> "When, however, the land has been viewed, and a determination arrived at to appropriate it, the question of compensation is to be considered; and in the absence of any express constitutional provision, fixing the time and the manner of taking it, the question who is to take the property—whether the State, or one of its political divisions or municipalities, or, on the other hand, some private corporation may be an important consideration.
>
> "When the property is taken directly by the State, or by any municipal corporation by State authority, it has been repeatedly held not to be essential to the validity of a law for the exercise of the right of eminent domain that it should provide for making compensation before the actual appropriation. It is sufficient if provision is made by the law by which the party can obtain compensation, and that an impartial tribunal is provided for assessing it. The decisions upon this point assume that, when the State has provided a remedy by resort to which the party can have his compensation assessed, adequate means are afforded for its satisfaction, since the property of the municipality, or of the State, is a fund to which he can resort without risk of loss."

In *Lewis on Eminent Domain*, 3d ed., Vol. 2, Section 679, p. 1166, it is stated:

"As a general rule, the courts which hold that compensation need not precede occupation also hold that some provision must be made for compensation whereby the owner will certainly obtain it, and that it is not enough that the law provides a mode for ascertaining the amount of compensation and imposes, on the party taking, the duty of making payment. A distinction is usually made by such courts between a taking by the public, that is by the State or public corporations, and a taking by private corporations or individuals. In the former case the compensation is a public charge, the good faith of the public is pledged for its payment, and all the resources of taxation may be employed in raising the amount. Where, therefore, the law requires the compensation to be paid out of the State treasury, or makes it a charge upon the general resources of a public corporation, such as a county, city, town, or school district, it is held that such sure and certain provision is made for obtaining compensation as satisfies the constitution."

1 *Nichols on Eminent Domain*, 2d ed., Chapter XIII, contains an admirable statement of the law relative to the constitutional right to compensation. Section 210, p. 635, states the law relative to a taking by a municipality as follows:

"Similarly when property is taken by a state and provision is made for payment out of the state treasury, the constitution is satisfied. For, although the state cannot be sued, and, if the legislature should rescind the provision for payment, the owner might be remediless, it is held that such a breach of public faith is not a reasonable possibility. As a state may always raise funds by taxation, inability to pay will not be presumed.

"When the taking is made by a municipal corporation, a similar presumption is reached. *In addition to his reliance on the public faith, the owner may sue the municipality,* and in many jurisdictions may satisfy a judgment against the corporation out of the property of any of its inhabitants. It is accordingly generally, although not universally, held that if nothing appears to the contrary, a taking by a municipal corporation will be valid, as far as the provision for compensation is concerned, if the owner may recover a judgment for the amount of such compensation which is enforceable by the laws of the state in some effective mode."

The Supreme Court of Rhode Island has several times directly passed upon or expressed an opinion by way of a dictum in regard to the law relative to compensation. In *Howe* v. *Norman* (1882), 13 R. I. 488, 494, Potter, J., in a concurring opinion, said:

> "But if this act does intend to give the right of eminent domain to anybody and everybody, it is open to another objection. It is the better opinion that the legislature cannot grant the power to take property for public uses without providing that compensation shall be made, and *except in the case of municipal corporations*, without also providing for securing the payment of this compensation."

In *East Shore Land Company* v. *Peckham* (1912), 33 R. I. 541, the court passed upon the provisions of a statute relative to compensation which involved practically the same issue as is now raised. In that case, Chap. 569 of the Public Laws of Rhode Island (1909-1910), p. 531, provided for the condemnation of certain lands by the state for metropolitan park purposes. Among other things, the statute provided that, upon the filing of a certain description, plat and statement, "the title in fee simple of such land shall vest in the State of Rhode Island;" and that, in case the owner could not agree with the commission upon the price for his property, he, if personally notified, could within three months, and if not personally notified within one year, petition the Superior Court for an assessment of damages by a jury, and that "upon the recovery of final judgment execution shall be issued therefor and shall be forthwith paid by the general treasurer out of any funds available therefor."

The constitutionality of these provisions, relative to the vesting of title and compensation, was called in question under the Fifth Amendment to the Constitution of the United States, and Section 10, Article I of the Constitution of Rhode Island, neither of which provisions were applicable, and under Section 16 of Article I of the Constitution of Rhode Island providing that "private property shall not be

taken for public uses, without just compensation." As to this latter constitutional provision, the case was considered.

The court, in holding "that the said act does not violate the requirements of the Constitution of Rhode Island, Article I, Section 16," quoted with approval the following extract from Black's Const. Law, 2d ed., p. 425:

> "If the power of eminent domain is exercised for the benefit of the State or one of its municipalities, it is not essential that payment should first be provided, for it is supposed that the public faith is a sufficient pledge and guaranty for the payment of what is awarded. But in this case, the law must provide a means of making his claim effective against the State or the municipality, which shall be adequate and certain, and which may be initiated by the property owner himself at his own discretion."

The court further in its opinion, p. 556, 558, said:

> "We certainly cannot assume that the Commonwealth will not fulfill its obligations. The presumption is directly the other way. *Indeed the plaintiffs do not aver in their bill that the damages which may be awarded to them under the act will not be duly paid.* How then can it be said that no suitable and adequate provision is made in the act by which the plaintiffs can receive the compensation to which they may be entitled? * * *
>
> "Can it be said that these provisions do not impose an obligation on the state? We think not. We cannot assume that the legislature intended to play fast and loose with the owners of the land described in the act, or that it was the intention to let the appropriations necessary to meet the expenses accruing thereunder be made the subject of future legislation. The language employed, while it may be unusual, is amply sufficient for the purpose. When the amount has been ascertained by agreement vouched for by an order, or by judgment verified by execution, the amount so established shall be forthwith paid by the general treasurer. If the act had stopped there the faith and credit of the state would have been sufficiently pledged without more."

The presumption that a state in the exercise of eminent domain will act in good faith and meet its obligation applies

when the taking is by a municipal sub-division of the state. A different rule is recognized by the Rhode Island court where the taking is by a quasi public corporation, although in the well considered case of *In re Pawtucket & Central Falls Grade Crossing Commission* (1914), 36 R. I. 200, the court held that a statute, allowing a railroad company to take possession of property before making compensation, when the title had not passed, was not unconstitutional. This case indicates that this court rejects, even as to takings by private corporations, the strict and narrow constitutional interpretations prevailing in some jurisdictions.

In *Joslin Manufacturing Company* v. *Clarke, City Treasurer, supra,* the Rhode Island Court referring to the Sears v. Akron case said:—

> "In regard to the provision for compensation it is to be noted that the complainants in this case have additional security to that which was given under the Ohio Act, in that provision is made under the Rhode Island Act that an execution for an award or upon a verdict for damages shall run against the city."

and held,

> "that when the power of eminent domain is exercised for the benefit of the State or a municipal corporation, if a remedy is provided against the State or municipality which is adequate and certain it is not essential that payment should first be made before the taking by condemnation."

The rule of law, as laid down by the Supreme Court of the United States relative to an owner's constitutional right to compensation and the time when compensation must be made, is in accord with the doctrine of the Rhode Island court as laid down in *East Shore Land Company* v. *Peckham,* and in *Joslin Manufacturing Company* v. *Walter L. Clarke, City Treasurer, supra.*

A leading case representing the rule of the United States Supreme Court is *Sweet* v. *Rechel* (1895), 159 U. S. 380; 40

L. ed. 188. In this case the Supreme Court was called upon to decide the constitutionality of a Massachusetts statute under a general provision of the Massachusetts Constitution, requiring that "whenever the public exigencies require that the property of an individual should be appropriated to public uses, he shall receive a reasonable compensation therefor." By the terms of the statute, the title to all land taken thereunder vested in the city of Boston before the compensation was made, and allowed the owner, if unable to agree upon the price, within one year to file a bill in equity for the assessment of damages and, upon the final determination of the amount, it was directed that execution issue therefor.

Mr. Justice Harlan, delivering the opinion of the court, p. 402, 404, 407, said:

> "It is equally clear that an adequate provision is made when the statute, authorizing a public municipal corporation to take private property for public uses, directs the regular ascertainment, without improper delay and in some legal mode, of the damages sustained by the owner, and gives him an unqualified right to a judgment for the amount of such damages which can be enforced, that is, collected, by judicial process.
>
> "*Substantially the same principles have been announced by this court when interpreting the clause of the Constitution of the United States that forbids the taking of private property for public use without just compensation.*
>
> "But that case (*Kennedy* vs. *Indianapolis*, 103 U. S. 599) by no means controverts the doctrine that the legislature may authorize a municipal corporation to take, for public use, at the outset, the absolute title to specific private property, if either the statute under which that is done, or a general statute, recognizes the absolute right of the owner, upon his property being taken, to just or reasonable compensation therefor, and makes provision, in the event of the disagreement of the parties, for the ascertainment, by suit, without unreasonable delay or risk to the owner, of the compensation to which under the constitution he is entitled,

and to a judgment in his favor, enforceable against such corporation in some effective mode, so that the owner can certainly obtain the amount of such compensation. The Massachusetts statute of 1867, unlike the Indiana statute, expressly declares that from the moment the property was taken in accordance with its provisions, the title should be vested in the city of Boston; that the city should thereupon proceed forthwith with the work of raising the grade; and that the owner should have the right, for the prompt enforcement of which adequate provision was made, to obtain reasonable compensation for his property.

"We are of opinion that, *upon both principle and authority*, it was competent for the legislature, in the exercise of the police powers of the Commonwealth, and of its power to appropriate private property for public uses, to authorize the city to take the fee in the lands described in the statute, prior to making compensation, and that the provision made for compensating the owner was certain and adequate."

Although the court in this case was directly concerned with a construction of the Massachusetts constitution, Mr. Justice Harlan makes it clear that he is also enunciating the doctrine of the court as applied to the federal constitution also. This case has been frequently cited by text writers on constitutional law and the law of eminent domain in support of the rule that a municipal corporation may, so far as compensation is concerned, appropriate outright private property for a public use if the owner may recover a judgment for such compensation which is enforceable by the laws of the state in some effective mode and without unreasonable delay.

In the case of *Williams* v. *Parker* (1903), 188 U. S. 491; 47 L. ed. 559, the court said:

"So far as the Federal constitution is concerned it is settled by repeated decisions that a state may authorize the taking of possession prior to any payment or even final determination of the amount of compensation."

In the case of *Madisonville Traction Co.* v. *St. Bernard Min. Co.* (1904), 196 U. S. 239; 49 L. ed. 462, the court said:

"If the purpose be public, the taking may be outright, pro-

vided reasonable, certain, and adequate provision is made, at the time of appropriation, to ascertain and secure the compensation to be made to the owner.

In the case of *Crozier* v. *Fried. Krupp Aktiengesellschaft* (1911), 224 U. S. 582; 56 L. ed. 771, Chief Justice White, delivering the opinion of the court, again stated the rule as to making compensation for private property taken for public use, as follows:

> "Indisputably the duty to make compensation does not inflexibly, in the absence of constitutional provisions requiring it, exact, first, that compensation should be made previous to the taking,—that is, that the amount should be ascertained and paid in advance of the appropriation,—it being sufficient, having relation to the nature and character of the property taken, that adequate means be provided for a reasonably just and prompt ascertainment and payment of the compensation; second, that, again, always having reference to the nature and character of the property taken, its value and the surrounding circumstances, the duty to provide for payment of compensation may be adequately fulfilled by an assumption on the part of government of the duty to make prompt payment of the ascertained compensation,—that is, by the pledge, either expressly or by necessary implication, of the public good faith to that end."

In *Bragg* v. *Weaver* (1919), 251 U. S. 57, 61-2; 64 L. ed. 135, 138, the Court by Justice Van DeVanter said:

> "Thus, by exercising the right to appeal, the owner may obtain a full hearing in a court of justice—one concededly possessing and exercising a general jurisdiction. An opportunity to have such a hearing before the compensation is finally determined, and when the right thereto can be effectively ascertained and protected, satisfies the demand for due process."
>
> "The claim is made that this opportunity comes after the taking, and therefore is too late. But it is settled by the decisions of this court that where adequate provision is made for the certain payment of the compensation without unreasonable delay, the taking does not contravene due process of law in the sense of the 14th Amendment merely

because it precedes the ascertainment of what compensation is just. *Sweet* v. *Rechel,* 159 U. S. 380, 402, 407; 40 L. ed. 188, 197, 198; 16 Sup. Ct. Rep. 43; *A. Backus Jr. & Sons* v. *Fort Street Union Depot Co.* 169 U. S. 557, 568, 42 L. ed. 853, 858, 18 Sup. Ct. Rep. 445; *Williams* v. *Parker,* 188 U. S. 491, 47 L. ed. 559, 23 Sup. Ct. Rep. 440; *Crozier* v. *Fried Krupp Aktiengesellschaft,* 224 U. S. 209, 306, 56 L. ed. 771, 776, 32 Sup. Ct. Rep. 488. And see *Branson* v. *Gee,* 25 Or. 462, 24 L. R. A. 355, 36 Pa. 527. As before indicated, it is not questioned that such adequate provision for payment is made in this instance."

In *Hays* v. *Port of Seattle, the State of Washington et al.* (1919), 251 U. S. 233, 238; 64 L. ed. 243, 246, where the statute gave an action against the state and provided for the payment of a judgment by the state auditor, the Court by Justice Pitney said:—

"We deem it clear also that the Act of 1913 had not the effect of depriving complainant of property without due process of law, in contravention of the 14th Amendment—this statute constitutes an adequate provision for assured payment of any compensation due to complainant without unreasonable delay; and hence satisfies the requirement of due process of law as clearly as if the ascertainment of compensation had preceded the taking."

The decisions of this Court accord with the state decisions generally relative to such a general constitutional provision as requires just compensation or its equivalent, due process. See Appendix Part Two, p. 15.

Nearly all the cases relative to this issue, cited by the plaintiffs in error, either do not seem to be in point or have been overruled. See Appendix Part Two, p. 22.

It is interesting to note the comments in 2 *Nichols Em. Dom.* Sec. 373, p. 1022, relative to special constitutional provisions requiring prepayment and the practice of evading the same by public service corporations and public agencies taking possession of lands without formal proceedings and the tolerance of the same by the courts.

"The result is that the system of taking property by administrative order has been in substance unconsciously adopted in many states which ostensibly retain the judicial method, but without sanction of law, and without the certainty of a definite record of the 'taking' or the advantages which the statutory petition for damages has over an ordinary action at law.

"A study of the current of decisions which have brought about this result raises at least a doubt whether the old system of taking by administrative order was not after all the one best adapted to the habits and methods of the American people and their impatience with anything which tends to block the development of the country with unnecessary formality and delay. The adoption of the judicial method of condemnation was merely, it would seem, another instance of the excessive zeal for the protection of property rights against the rights of the public which marked the professedly liberal school of nineteenth century jurisprudence and it is now coming to be recognized that the public interests were best subserved by the tried methods of the older and more conservative states."

ISSUE 3.

The Provisions of Section 21 of Said Act, Authorizing the City of Providence to Lease on the Conditions Specified Therein Any Lands Acquired under Said Act and Held to Protect the Water Supply from Pollution, Do Not Conflict with Said Fourteenth Amendment.

The complainants object to the provisions of Section 21 of said Act authorizing the city to lease lands taken which are not required for the reservoir or other works, but are held to protect and preserve the waters from pollution.

No proper constitutional issue is raised in the complainants' bills relative to the authority conferred by the Act upon the city of Providence to lease subject to the conditions provided in the Act such lands as are taken and held for the sanitary protection of the water supply. The allegations in

this connection appear in paragraphs 22 and 54 of the bill of complaint of the Joslin Manufacturing Company, with similar allegations in each of the other bills. Yet neither by inference nor directly is it alleged that the city either has leased, threatens to lease, or is likely to lease any of the lands taken under the Act. The purport of the whole issue, as attempted to be raised by the complainants, is to obtain from this court a constitutional decision on a hypothetical question, although the complainants, as appears from paragraph 54 of the bill of the Joslin Manufacturing Company, have collected several provisions of the Act, including the lease provision, and, by throwing them together, have attempted to give color to their contention that an inadequate provision is made for compensation.

State v. *Snow* (1854), 3 R. I. 64.
City of Newport v. *Horton* (1900), 22 R. I. 196.
Penniman's Case (1880), 103 U. S. 714; 26 L. Ed. 602.
Presser v. *Illinois* (1886), 116 U. S. 252, 263.

Section 21 of the Act is a distinct and separable provision from all the others, and should be so considered, if passed upon at all by this court.

The provision itself has no bearing upon the validity of taking outright the complainants' properties. The Act is very explicit to the effect that this authority to lease is to lease only such lands as are held to protect the water supply from pollution. This authority to lease on the conditions specified enters in no degree into the purpose or motive of the taking, and has only to do with the management of the property after it has been properly and legally acquired under the provisions of the Act.

The sole question presented under this issue then is whether, as a matter of management of municipal property that has been taken to protect the water ways and basin of this new water supply from pollution, it is proper for the

city of Providence to derive an incidental benefit from such lands by leasing them to parties on such conditions as are compatible with the purpose for which they were taken.

After an exhaustive examination of cases in which analogous issues have been considered by the courts of various jurisdictions, we have been unable to find a single instance where the authority thus conferred has been held objectionable. There is, moreover, ample authority that where property has been taken for a recognized public use, it is not objectionable that an incidental revenue is derived therefrom apart from its public use. This conclusion rests upon principle and common sense. If held otherwise, the law would discourage making property fully productive. In case of a municipality, if some incidental revenue can be derived without interfering with the effectuation of the public purpose for which the property was taken, it operates to some extent for the benefit of the public by lightening the burden of the taxpayer or the cost of the public service. It will be remembered that two of the complainants in the present causes emphasize that they are large taxpayers in the city of Providence, and this provision may operate for their benefit.

In *Moore* v. *Sanford* (1890), 151 Mass. 285; 24 N. E. 323, there was a large area of lands and flats taken by the Commonwealth to be filled in and used for commercial and railroad purposes. The court said:

> "Even if it be true that the Commonwealth, as the result of the enterprise, expects to sell its lands to advantage, many enterprises of great public utility are of advantage to individuals. *Boston & Roxbury Mill Co.* v. *Newman*, 12 *Pick.* 467. *Talbot* v. *Hudson*, 16 *Gray*, 417. If lands are taken for a public use and for the benefit of the community, it is not of importance that individuals, or, as in this case, the Commonwealth, may derive incidental advantage therefrom."

In *Boston* v. *Talbot* (1910), 206 Mass. 82, the court said:

> "The legislature well might determine that a taking in fee might be necessary in certain cases, in reference to a reasonably economical management of the business in the public interest, even though the use of the fee would not be needed permanently, *and might authorize a subsequent sale or leasing of any rights in the property that were no longer devoted to the public use.* We see no reason for doubting the constitutionality of the Act."

In the case of *Jones* v. *Sanford* (1877), 66 Me. 585, it was held that a town did not exceed its authority when, for the purpose of securing a better town hall and for the consideration of the making of certain improvements and repairs, it permitted a dramatic company to use the same during a certain number of years at times when not wanted for public purposes.

In the case of *Bates* v. *Bassett* (1888), 60 Vt. 530; 15 Atl. 200, it was held that a statute authorizing towns to vote money for necessary incidental purposes enabled the town of Barre to build a new town house and fit up and rent a portion of it as an opera house, if the primary object of the building was for municipal purposes. Although this case arose under an objection to levying a tax for the purpose, yet it involved the question, whether the renting of a portion of the building, not occupied for municipal purposes, rendered improper the whole project. It has been many times held that what constitutes a public purpose for condemnation is a public purpose for taxation, and wherever the courts have differentiated between what constitutes a public use in the exercise of these two powers, they have made a more strict interpretation relative to the purpose of taxation. *Judson Taxation*, 2nd ed., Sec. 388. The case is, therefore, a stronger holding as regards the present consideration than if it had involved an eminent domain proceeding.

In *Bryant* v. *Logan* (1904), 56 W. Va. 141; 49 S. E. 21, the court held proper the leasing of part of a city park for a racetrack.

See *Note* 31 *L. R. A.* (*N. S.*) 580.

The further claim of the complainants that the city of Providence should not be able to lease any of the properties taken, before compensation has been made to the former owner, is sufficiently met by a consideration of the authorities presented in and under Part Two, Issue 2 herein, and Part Two of the Appendix hereto. The authorities there set forth establish beyond doubt that a municipality for the furtherance of a public use may appropriate in fee simple private property before making or securing compensation, if there be provided the owner a means of having his damages determined by an impartial tribunal, and the award enforced without unreasonable delay. It would, of course, be an absurdity to hold that a municipality acquired ownership in fee simple, and then to hold that it did not thereby acquire the rights of immediate possession, use and management that are component rights of the estate so acquired, unless and except to the extent restrained by an express provision of the statute. How completely would one of the main purposes of the right of eminent domain by the state or a municipal sub-division thereof be defeated, if, after the property was appropriated, it could not be fully and expeditiously used in accordance with the purpose of its appropriation!

Further as the Act vests in the City of Providence a fee simple estate in such lands and water rights as are taken under it, the complainants, as former owners, have no interest or standing to object to an incidental or further use of such lands, such as a leasing on the conditions specified. Such properties would not revert to the former owners, even if the use, for which the same were taken, was changed or definitely abandoned.

Nichols on Eminent Domain, 2nd ed. Vol. 2, p. 1421.
Lewis on Eminent Domain, 3rd ed. Vol. 2, p. 1500.
McConihay v. *Wright* (1896), 121 U. S. 201; 30 L. ed. 932.
Hellen v. *Medford* (1905), 188 Mass. 42, 73 N. E. 1070.
Heyward v. *New York* (1850), 8 Barb. 486.

ISSUE 4.

The Provision of Section 25 of Said Act, Authorizing the City of Providence, Upon Taking Possession of Lands, to Sell and Cause to be Removed Any Buildings or Improvements which Would Obstruct the Work, Does Not Violate Said Fourteenth Amendment.

A review of the authorities, in Part Two, Issue 2, and in Part Two of the Appendix hereto, compels the conclusion that the overwhelming weight of authority in the United States recognizes that a municipality may appropriate outright, and acquire title in fee simple and take possession of private property for public use without making compensation in advance, and that it is necessary only that the owner be afforded a means of establishing his damages before an impartial tribunal and be able to enforce the award that is made without unreasonable delay.

It follows as an unavoidable inference that, if a municipality has the right to acquire title in fee simple and possession of private property for public use, it acquires also as an incident of and component part of such an estate, the right to make such use of the premises or the structures thereon as may be necessary to carry out the purpose of the condemnation. Such is the authority conferred upon the city of Providence by Section 25 of said Act. How unavailing would be the power of eminent domain, if the city, after acquiring the property, could not remove and dispose of such structures as impeded and interfered with the effectuation of the purpose of the taking.

The basis of the complainants' objections in this regard rests upon a contention that is essentially incompatible with the reasons upon which the courts decided the cases cited under Part Two, Issue 2 herein, and Part Two of the Appendix hereto. Yet irresistible as is the conclusion derived from the cases and authorities already presented, that the

city of Providence has a perfect and complete right to avail itself of the authority conferred by Section 25 of said Act, still it is not necessary for the respondents to rest alone upon the same. The specific objection now made by the complainants has been raised in other cases and been rejected by the courts.

In the case of *Connolly* v. *Van Wyck* (1901), 72 N. Y. Supp. 382, the plaintiff was the owner of certain premises in the city of New York, title to which had been acquired by that city under condemnation proceedings pursuant to an act of the legislature. The act vested title in the city of New York, and authorized the tearing down and sale of buildings on the premises before compensation to the former owner was made or the amount of the award determined. The complainant asked for a temporary injunction restraining the defendants, the East River Bridge Commission, from proceeding to acquire his property and from selling the house thereon prior to the award of compensation. He contended that the exercise of such authority amounted to an unconstitutional taking of his property without "due process" of law. The court said:

> "Courts of this State have decided that such a provision is not a violation of our Constitution.
>
> 'Mr. Justice Patterson, *In Re Mayor, etc., of City of New York*, 72 N. Y. Supp. 378, in a well considered opinion, held it to be the settled law of this state that a provision of statute law authorizing the taking of private property by the State or one of its municipalities, under the right of eminent domain, without providing for payment prior to or concurrently with the taking, is constitutional.' * * *"

In the case of *Hill* v. *Wine* (1898), 54 N. Y. Supp. 892, where buildings had been torn down and demolished, it was held in effect that a condemnation act similar to that in the Connolly case (*supra*), vesting title in the city of New York, authorized the city to remove the buildings, and that the only right which the former owner and the mortgagee of the

property had, was to enforce the obligation of the city under the Act to pay the values of their respective interests in the property.

In the case of *Smeaton, et al.*, v. *Martin* (1883), 57 Wis. 364, the town supervisors under a statute entered upon a farm and excavated a deep ditch thereon, drawing the water down upon and flooding the land, doing damage to crops. The court dissolved an injunction which had been granted restraining the supervisors from acting under the authority conferred upon them by the statute, holding that the property had been taken under proper condemnation proceedings for a public purpose, and that a taking by such a method did not violate the constitutional inhibition that "the property of no person shall be taken for public use without just compensation therefor." The court held that the property owner's remedy was to be sought thereafter in the manner prescribed by the statute, saying:

> "In this respect we think there is a broad distinction between the taking of private property for public use by a town or municipal corporation, and the taking of it by a private corporation, the responsibility of which may be very uncertain. Where the property is taken for public use by a town or municipal corporation which is made liable to the owner for any damage sustained by reason thereof, the taxable property of such town or municipality constitutes a pledge or fund to which such owner may resort for payment in the manner so prescribed by the statute, with absolute safety." * * *

Thus the court upheld the authority conferred by the statute, permitting the town supervisors to enter upon and alter the physical condition of the property, leaving the owner to subsequently establish and recover his damages from the town.

This rule was also applied in *Talbot et al.* v. *Hudson et al.* (1860), Mass. 16 Gray 417, where commissioners proposed to remove a dam in consequence of which the complainants' mill would be largely destroyed.

The case of *McCormick et al.* v. *President and Trustees of Town of Lafayette* (1848), Ind. 1 Cart. 48, was an appeal from an order of the court below, dismissing an injunction against the town authorities who were about to enter upon complainant's land "and remove the buildings and appropriate said ground," for highway purposes under a certain condemnation act which did not require compensation being made to the complainants in advance. It was urged by the complainants that the taking of their properties under such conditions would be in violation of the constitutional provisions of the Constitution of Indiana requiring:

> "That no man's particular services shall be demanded, or property taken or applied to public use, without the consent of his representative, or without a just compensation being made therefor."

The court, in affirming the decree of the lower court dismissing the injunction, said:

> "Acts authorizing the taking of private property in such cases, have repeatedly been held valid and not in contravention of similar prohibitions contained in the Constitution of the United States and of the several states, though such acts did not make provision that the damages should be actually ascertained and paid before the property was to be taken possession of for the *uses contemplated.*

In the case of *Jeffersonville, etc., R. R. Company* v. *Daugherty* (1872), 40 Ind. 33, the court denied a prayer for an injunction to restrain a road supervisor from entering upon land and taking away gravel from the complainant's gravel pits for the purpose of road repairing, under the authorization of an Act which did not require compensation for damages to be made in advance, and said:

> "The taking of private property therein provided is a taking by the state."

In the case of *State* v. *Hill* (1888), 100 N. C. 497, the defendants were indicted for forcible trespass in entering upon

land and tearing down and removing a part of the enclosing fence. The defense was, that the defandants removed the fence pursuant to the authority of an ordinance and the City Charter, authorizing the condemnation of lands for the purpose of widening streets "upon making reasonable compensation to the owner thereof." The court, in affirming judgment for the defendants, held that compensation prior to the taking was not required.

Wheeler v. *Essex Public School Board* (1877), 39 N. J. L. 291, 297.

Fogarty v. *Cincinnati* (1900), 9 Ohio Decisions 753.

Appeal of County of Delaware (1888), 119 Pa. St. 159.

The above authorities and those also referred to under Part Two Issue 2 herein and Part 2 of the Appendix hereto establish that, both on principle and authority, the provisions of Section 25 of said Act are constitutional.

ISSUE 5.

The Provisions of Section 18 of Said Act, Giving to Certain Municipalities and Water and Fire Districts the Right to Take and Receive Water and Permitting the City of Providence to Sell Water to Water Companies Located Within the Drainage District, on the Terms and Conditions Specified Therein, Do Not Conflict with Said Fourteenth Amendment.

The complainants, Joslin Manufacturing Company and Theresa B. Joslin, have both alleged in their bills that they are large taxpayers in the city of Providence, and that said Act violates said 14th Amendment,

> "In that it permits the taxpayers of said city of Providence to be burdened by a large and unnecessary expenditure and by an expenditure which is not wholly for the benefit of said city of Providence but in part for the benefit of other

municipalities or companies outside of the city of Providence which do not contribute to any portion of the expenditure for said water supply."

Now what are the provisions of said Act to which the complainants thus object? Section 18 of the Act confers upon certain municipalities, fire and water districts situated within the drainage district the right to take and receive water from the new storage reservoir or aqueduct provided for, or from the existing reservoir of the city at Sockanosset, for use for domestic, fire and other ordinary municipal water supply purposes in their respective territories, or such parts thereof as are included in the drainage district and where there is no public water supply being furnished by any public or quasi public body or corporation at the time such town, city or water district decides to take such water, and to an amount not exceeding an average per day of one hundred gallons per capita of the number of inhabitants of such parts of such territories respectively as are served from such water supply source, unless the officers of the city of Providence in charge of its water works shall consent to the taking of a greater quantity of water. This right is extended to cover territory in Warwick easterly of the New York, New Haven and Hartford Railroad Company's railroad line and north of Greenwich bay. It is also provided that for the water taken and received by any such municipality or district, a fair wholesale price shall be paid to the city of Providence, and that the cost of installing proper connections, meters, etc., for taking and measuring the water shall be borne by such municipality or district receiving it. In other words, such privileges as are extended to other municipalities or districts are to be fully paid for. In addition the city is permitted to furnish water to water companies located within said territories, and although the terms for the same are not specified of course only for due consideration. This section inures to the general benefit of the taxpayers of Providence in that it affords a proper means of selling to these munici-

palities and companies, at a profit, some of the excess water not required for many years for supplying the needs of the city of Providence. And Section 26 of the Act authorizes the hiring of funds to defray the cost of obtaining the water supply, and provides for a sinking fund for the redemption of the water bonds, and requires the net receipts from the water rents and certain other receipts to be placed in said sinking fund.

Apart from the fact that the complainants are mistaken, as is shown on the face of the Act itself, in their allegation that it permits taxpayers of said city of Providence to be burdened, it must be recognized that the municipalities which are extended such privileges have a natural interest and concernment in the drainage area and water source which is appropriated by the city of Providence under said Act. Some of the municipalities receiving this right are already being supplied by the city of Providence with water taken from the Pawtuxet river near its outlet into Narragansett Bay, and both the present and the prospective recipients of this right are largely dependent for a water supply upon this drainage area and water source. Even if the provisions of the Act had imposed some burden upon the taxpayers of the city of Providence, still it would be natural and proper for the state to impose as a condition on the city of Providence in allowing it to appropriate this water source the obligation to furnish water on proper terms to other municipalities dependent upon the same source of supply

The plaintiffs' main objection to the terms for supplying said other communities is that the City of Providence finances the first cost and maintenance of the project, and the measure of the charge for such supply does not expressly provide for the payment of their proportionate share of the first cost and maintenance of the project. It is apparent, however, that such first cost and maintenance expenses would naturally be included to such extent as would be rea-

sonable under the circumstances in the fair wholesale rates or charges for the water. It is also apparent that it would not have been equitable if the Act had provided as a basis the cost of providing said new water source and of constructing said new water works. For instance, the territory in the town of Scituate remaining after the taking has two small villages, one North Scituate bounding on the north end of the reservoir area, and the other Hope at the south end of the town, the latter already having a water supply. If North Scituate should ever be supplied from the reservoir, the water would necessarily be taken from the north end of the reservoir, and it would manifestly be inequitable to include as part of the charge basis the cost of the filtration works to be located on land adjoining the south end of the reservoir, and the very large cost of constructing the great aqueduct from the filtration works to Sockanosset.

Therefore the Act apparently provides for the only general basis that would be practical and equitable and have regard to the different situations of such communities. If the great cost of the entire project had been made the basis, it practically would have debarred the small rural communities from getting any supply from this source, while but for the taking they could obtain water from the river at a comparatively small cost.

The main act providing for an additional water supply for the City of New York, Laws of New York of 1905, Chapter 724, authorized supplying municipalities located in Westchester County and a municipality in Ulster County, and provided for the same rates as paid by the water users in New York City. The supplementary New York Act of 1909, Chapter 350, provides that any municipal corporations in the County of Nassau can take water from any reservoir, aqueducts, streams or water pipes of the City of New York located in said county, and has provision for payment therefor as follows:—

"S. 3. Any municipality taking water under the provisions of this act shall pay to the City of New York such sum per unit of measure as may be agreed upon between said municipality and said officer, department or bureau, which said officer, department or bureau is hereby authorized and empowered to make such agreement; but said charge shall not be greater than the charge per unit of measure made by the City of New York to the inhabitants of Brooklyn who receive water through meters from the public water supply belonging to the City of New York."

Therefore it is seen that under these acts the costs of the water works were not made the basis for the water charges, and that under the last mentioned act there was no basis provided, although the charges were limited to not exceed the rates made by New York for supplying Brooklyn inhabitants.

The Massachusetts Metropolitan Water Supply Act of 1895, Chapter 488, Sec. 3, authorized the water board to sell water to towns and water companies outside the Metropolitan Water District as follows:—

"—and from time to time furnish water to any other city, town or water company, on such payment of money as said board may determine."

Any objection to the effect that the legislature in this Act should have created a Metropolitan Water District and provided that all towns in the drainage districts should contribute towards defraying the first cost of acquiring the source and constructing the water works, ignores the conditions known of course to the legislature that most of the compactly settled territories therein already had and did not need a water supply, and that it was very uncertain when, if ever, the remaining rural territories of small population would need or be able to bear the expense of establishing a water distributing system. Further, it is to be presumed that the legislature acted in the light of all the relevant facts and surrounding circumstances, including for instance the

fact that the Town of Scituate had at the time of the passage of the Act its notes outstanding to a substantial total amount held by its citizens, on which the interest due had not been paid for a number of years, and the Town was in no such condition as would enable it to bear any such financial burden, and also including the fact that the representatives of the City of Providence were strongly opposed to other municipalities or towns having any rights in the ownership or control of its water works.

POINT I.

Although, in the Absence of Statutory Authority, It May Be Doubtful Whether a City, Owning Its Water Supply System, Would Have Authority to Supply Other Municipalities with Water, It Is Well Established that Such Practice Is Proper Where Statutory Authority Has Been Given.

The courts have repeatedly recognized it to be proper for one municipality to maintain a water supply system and sell water to another municipality, when such extra territorial dealings are not entered upon as the primary purpose of maintaining the water supply and when the inhabitants of the supplying munipicality are not deprived thereby. There are many cases that have come before the courts upon a variety of issues that recognize and follow this rule, and we have been unable to find a single instance where, under such circumstances, the courts have held such dealings to be improper.

The following authorities recognize the propriety and right of a municipal corporation, owning its own water or lighting plant, to supply other municipalities and their inhabitants. *McQuillin Municipal Corporations,* Vol. 4, p. 3858, states:

> "At any event, the legislature has authority to confer power upon a municipality owning its own water or light plant to contract with neighboring municipalities, or persons residing outside of the limits, to furnish a supply to them or to their inhabitants, but such authority will be

strictly construed. For example, in New Jersey, the statute authorizing a municipality owning its water works to make contracts with any 'adjoining' municipal corporation has been construed to apply only to municipalities whose corporate territories are contingous.

"In Texas, a statute authorizing a city owning its water plant to grant the use of water to manufacturing plants outside its territorial limits is not obnoxious to the constitutional provision forbidding a grant of a thing of value to such corporations. And charter power to sell a surplus of the supply outside the territorial limits is not unconstitutional as violating a provision prohibiting municipalities from giving any property to or in aid of any individual or company or to incur a debt other than for a city purpose."

In *Dillon Municipal Corporations*, 5th ed., Vol. 3, Sec. 1299, p. 2121, appears the following statement of the law:

"But in the absence of any constitutional restriction or prohibition, it is within the power of the legislature to authorize a municipality, at least as an incident to the construction and maintenance of its own water works, to contract with neighboring municipalities to supply water thereto or to their inhabitants. And in California it has been held that when a city is authorized to acquire waters and water rights beyond its limits, and in the exercise of that authority acquires the property of a water company, which under the Constitution and statutes of that State is charged with the duty of supplying persons with water outside the city limits, the city becomes bound, upon the purchase of the water rights and property of the company, to fulfil its constitutional and statutory obligation, and to supply the persons entitled to receive a supply from the source acquired by it from the water company. And where the contract with another municipality is confined to surplus waters which the city has in good faith acquired for its own purposes, but which it does not presently require, the contract has been sustained as within the power of the city."

A California case, recognizing the doctrine stated above, is *Fellows* vs. *City of Los Angeles* (1907), 151 Cal. 52, 63. Shaw, J., said:

"The charter of Los Angeles gives it power to acquire water and water-rights, within or without the city, for the use of its inhabitants. In the exercise of this power it would have the right to buy from any corporation or person engaged in supplying water for public use outside the city any surplus water which such corporation or person might possess. If it were necessary in order to obtain such surplus, the city might, under this power, purchase the entire water supply of such person or corporation and water plant or system used in connection with it, so that, after operating the system and supplying the persons entitled to use that water, it could devote the surplus to the use of the inhabitants of the city."

This case presents practical and equitable considerations which are especially applicable to the issue in the cases at bar. The legislature has authorized the city of Providence to acquire a certain defined source for supplying the city with pure water. But the state has in effect imposed upon the city of Providence as a condition of acquiring that source of supply, that certain other municipalities shall be allowed to take and receive water from the supply system established, paying a fair wholesale price therefor. As already suggested, the state very properly imposed this requirement, in that the municipalities given a right to take and receive waters under restricted conditions are municipalities whose natural drainage area and whose natural source of supply is the source which the city of Providence has been authorized to appropriate. And in the case of *Fellows* v. *Los Angeles* (*supra*), the court recognized the justice of requiring the municipality which obtained a source of water supply in which others were naturally interested, to continue as a condition of such appropriation to supply the parties so interested.

In the case of *City of So. Pasadena* v. *Pasadena L. & W. Co.* (1908), 152 Cal. 579, the court held that under the constitution and statutes of California, the city of Pasadena, upon purchasing the property, franchise and business of a

water company, a portion of whose water was appropriated to the use of a part of the city of South Pasadena, not only could but was in duty bound to continue to supply water to that part of South Pasadena and its inhabitants.

Hewitt vs. *San Jacinto & P. V. Irrig. Dist.* (1899), 124 Cal. 186, 192.

In the case of *Colorado Springs* v. *Colorado City* (1908), 42 Col. 75; 94 Pac. 316, it was held to be within the power of a city to make a contract with another city to furnish it water where such contract does not interfere with the supply of water to its own inhabitants, since the making of such contract is not an exercise of its legislative or governmental powers but is made for the private advantage of the inhabitants of the city itself as a legal personality.

In the case of *Childs* v. *Columbia* (1911), 87 S. C. 566; 70 S. E. 296, the court said:

> "All powers and privileges conferred by the Constitution and statutes on municipal corporations must be held to be limited in their exercise to the territory embraced in the municipal boundaries and for the benefit of the inhabitants of the municipality, *unless the Constitution or statute expressly provides that such powers and privileges may be exercised beyond the corporate boundaries, or for the benefit of nonresidents.*"

In the case of *City of Rochester* v. *Briggs* (1872), 50 N. Y. 553, the court, in passing upon the validity of a statute which was questioned upon the ground that it embodied matters not contained in its title, said:

> "To secure this object it is assumed to be necessary for the city authorities to go beyond the limits of the city to procure the requisite supply, and in doing so they must come in contact and deal with private and other interests in no way connected with the city. They must take private property, pass over and use public highways, streets, and perhaps railroads. The authority to secure these rights,

> although it may involve details in no other way connected with the city, and may affect other persons or corporations and their property, does not constitute it an independent subject. *The power to supply villages with water by contract is incidental to the main purpose, and may serve as a means of attaining it.*"
>
> *Burnett* v. *Boston* (1899), 173 Mass. 173, 176.

The Act confirmed an agreement between the City of Boston and the town of Southborough relative to Boston constructing a reservoir in Southborough, taking land therefor and discontinuing certain old highways and establishing and building new highways, which agreement provided for Southborough taking not exceeding two hundred thousand gallons of water per day to supply the inhabitants of the town.

The Court said:—

> "The agreement contemplated much besides the changes in the ways. The provision for a taking of two hundred thousand gallons of water per day by the town from this basin implies the construction of a great reservoir by the city, from which this comparatively small quantity may be drawn as an incident to the changes to be made—The statute authorizes the taking of all lands which the city deems necessary to carry out the agreement. This means a taking to carry out the plan which the agreement plainly suggests, namely, the construction of a great reservoir involving general changes in the roads, and providing a place from which the town as well as the city may take its supply of water."

In recognition of the rule that authority for a municipality to furnish water outside its limits may be conferred by statute, it was held in *Pittsburg* v. *Brace Brothers* (1893), 158 P. A. 174; 27 Atl. 854, that such authority is conferred by a statutory provision that the city "may proceed to recover water rates due and unpaid beyond the limits of the city, as well as within the same, in the same way as city taxes are now recoverable."

In the case of *Omaha Water Co.* v. *Omaha* (1908), 89 C. C. A. 205; 162 Fed. 225, affirmed in 218 U. S. 180, it was held that where a city exercised its statutory rights to acquire the plant of a private corporation supplying the city with water, it was bound to acquire the entire system, though it extended to and supplied adjacent towns.

West Hartford vs. *Water Com'rs.* (1896), 68 Conn. 323; 36 Atl. 786.

Halifax vs. *Soothill Upper Local Board* (1874), 31 L. T. N. S. 6, affirming 30 L. T. N. S. 513.

Rogers vs. *City of Wickliffe* (1906), 29 Ky. L. Rep. 587; 94 S. W. 24.

In the case of *Kaukana Water Power Co.* v. *Green Bay & Miss. Canal Co.* (1891), 142 U. S. 254, 273, the court said:

"But if, in the erection of a public dam for a recognized public purpose, there is necessarily produced a surplus of water, which may properly be used for manufacturing purposes, there is no sound reason why the State may not retain to itself the power of controlling or disposing of such water as an incident of its right to make such improvement. Indeed, it might become very necessary to retain the disposition of it in its own hands, in order to preserve at all times a sufficient supply for the purposes of navigation.
* * *

"As there is no need of the surplus running to waste, there was nothing objectionable in permitting the State to let out the use of it to private parties, and thus reimburse itself for the expenses of the improvement."

In the case of *United States* v. *Chandler-Dunbar W. P. Co.* (1912), 229 U. S. 53, 72-73, the court said:

"It is said that the 12th section of the Act of 1909 authorizes the Secretary of War to lease upon terms agreed upon, any excess of water power which results from the conservation of the flow of the river, and the works which the government may construct. This, it is said, is a taking of private property for commercial uses, and not for the

improvement of navigation. But, aside from the exclusive public purpose declared by the 11th section of the Act, the 12th section declares that the conservation of the flow of the river is 'primarily for the purposes of navigation, and incidentally for the purpose of having the water power developed, either for the direct use of the United States, or by lease * * * through the Secretary of War.' If the primary purpose is legitimate, we can see no sound objection to leasing any excess of power over the needs of the government. The practice is not unusual in respect to similar public works constructed by state governments."

Pikes Peak Power Co. v. *City of Colorado Springs* (1900), 105 Fed. 1, 14.

A city and its officers have the authority, and it is their duty, to apply the surplus power and use of public utilities for the benefit of the municipality and its citizens, provided such application does not materially impair their usefulness for the public purposes for which they were created.

"Another argument of counsel for the appellee was that the portion of the ordinance which grants rights and privileges outside the limits of the city is void, because the city council has no power over that portion of the water system which is not specially given by legislative enactment. But, if the premise of this argument is sound, the conclusion does not follow, because the statutes which we have already quoted give ample power to the city council to grant the rights and privileges in that portion of the water works and of the water beyond the limits of the city which were conveyed in the ordinance. 2 Mills Ann. St. Sec. 4492, 4403, par. 68."

Paris Mountain Water Co. v. City of Greenville (1918), 110 S. C. 36, 55; 96 S. E. 545, 549, 550.

Action by the plaintiff against City of Greenville to enjoin the city from proceedings to condemn for the city's use the company's water plant. Demurrer to complaint. The same sustained. Appeal by the company.

"The Constitution authorizes towns to 'operate waterworks systems, * * * and may furnish water * * * to individuals, firms and private corporations for reasonable compensation.' These words do not expressly or by necessary implication limit the service to individuals, firms and private corporations within the corporate limits . . . The town is a creature of the legislature and the Legislature may (within the limits of the Constitution) define the powers of the town.

"It is a matter of common knowledge that generally the water supply and reservoirs and lead pipes of many towns are of necessity many miles without the corporate limits. It is also a matter of common knowledge that many of the towns of the state, and chief among them Greenville, are surrounded by manufacturing plants domiciled just out of the corporate limits, and by suburban villages operated under separate charters, and divided off from the city by an arbitrary line . . . The suggestion that the city will go into 'municipal trading', condemned by Mr. Dillon, does not raise a question of law, but of policy, and that policy has been determined by the Constitution and by the Legislature. See *Omaha* v. *Omaha*, 218 U. S. 199, 30 Sup. Ct. 615, 54 L. ed. 991, 48 L.R.A. (N.S.) 1084."

Board of Commissioners of Larimer County et al v. *City of Ft. Collins* (1920), 68 Col. 364; 189 Pac. 929.

Syllabus—The case involves practically the same points as case cited in the brief—Colorado Springs v. Colorado City. (1908)—namely that a city's contract to furnish water to consumers outside of the corporate limits of the city is not *ultra vires;* that a city operating a waterworks system acts in a business and not in a political capacity; and that a city has the power to dispose of surplus water for profit without legislative authority.

Town of Kearny v. *Mayor and Council of City of Bayonne* (1919), 90 N. J. Eq. 499, 504, 505; 107 Atl. 169, 171.

This case held that a municipality having legislative authority to acquire a water supply without the city and to extend any system of water distribution within or without

the municipality, had the right, as part consideration for the grant to it of rights of way for its mains, to contract to furnish water from such mains to the owners or occupants of the tracts without the municipality through which the rights of way ran, and approved of the reasoning in *People ex rel. City of Rochester* v. *Briggs*, 50 N. Y. 553, 563, that "The power to supply villages with water by contract is incidental to the main purpose, and may serve as a means of attaining it." The court further held that Bayonne, having taken over the water plant of the former water company, was bound to carry out the latter's contracts to furnish water to such owners and occupants. Previously an application had been made by a taxpayer of Bayonne for a writ of certiorari to review the proceedings by which Bayonne sought to acquire the property of the water company, which was denied. Subsequently the Mayor refused to sign the contract and mandus to compel him to do so was granted. Later an injunction was sought but denied.

The above authorities which in some instances go so far as to hold that, under certain circumstances, it becomes the affirmative duty of one municipality to supply water to another municipality, make it clear that the complainants cannot base their objections to Section 18 of said Act on the ground that it is improper for one municipality to supply water to another municipality, when affirmatively authorized by statute so to do. It is also clear that the contention of the complainants, Joslin Manufacturing Company and Theresa B. Joslin, that they as taxpayers are burdened by a large and unnecessary expenditure, is refuted by the provisions of the Act itself and by the fact of the passage of the Act. As hereinbefore seen, it is for the legislature or the authorized public representatives to determine the extent of public works, and the rights that are conferred upon other municipalities are reasonable, since such other municipalities must bear the cost of installing proper connections with, and meters through which to receive the water

from, the aqueduct and reservoirs, and by the terms of the Act must pay fair wholesale rates for the water taken.

POINT II.

The Discretion and Judgment of the General Assembly in the Exercise of the Legislative Power of the State as Shown in the Plan and Provisions of the Act, and the Action of the City Council Representing the Governmental and Prudential Powers of the City in Accepting the Act and Carrying Out its Provisions, Can Not, in the Absence of Evident Bad Faith or Gross Abuse, Be Challenged by Taxpayers of the City.

A.

There Are No Allegations of Fact Showing Bad Faith or Gross Abuse. The Supplying Other Towns, Water or Fire Districts is Merely Incidental to the Main Purpose.

There are no allegations of fact in the bills of the Joslin Manufacturing Company and Theresa B. Joslin indicating any bad faith or showing any gross abuse of power by the legislature or city council. The allegation that the Act is unconstitutional "in that it permits the taxpayers of said City of Providence to be burdened by a large and unnecessary expenditure" is merely a general allegation of the pleader and is conclusively disposed of by the decision of this court in *Sears* vs. *City of Akron, supra.*

The further allegation that it permits the taxpayers to be burdened "by an expenditure which is not wholly for the benefit of said City of Providence but in part for the benefit of other municipalities or companies outside of the City of Providence which do not contribute to any portion of the expenditure for said water supply," is not alone sufficient to show any bad faith or gross abuse of power by the legislature or city council, and on the contrary every presumption arises that each of these public bodies acted upon full in-

formation of the relevant facts and after due deliberation and with due regard to the public interests involved, the legislature as representing all the public concerned, and the city council the public it represented.

It appears by the defendants' answers, Joslin Manufacturing Company case, Transcript of Record "61", p. 94, Theresa B. Joslin case, Transcript of Record "52", p. 78, that the territories which may be supplied under Section 18 of said Act are dependent for a public water supply in whole or in part upon said Pawtxuet river, and that their natural and equitable right to have such a supply was recognized by the legislature and the city council of Providence; and that said Section 18 was not adversely imposed upon said city as said city council by resolution, approved March 16, 1915, directed the City Solicitor to apply to the General Assembly for the passage of said Act; and that the territories having no public water supply which would have the right to obtain a water supply, comprise for the most part agricultural communities with a small population estimated in view of the State Census of 1915 and the United States Census of 1920 at approximately 19,000, while the population of the City of Providence and the other territories supplied by the water works of said city was at the time of the passage of said Act approximately 270,000; and that relative to the unsupplied rural territories having the right to a supply it would be, on account of the prohibitive cost of installing a water distributing system, impracticable for a large part of said 19,000 population to have a public water supply furnished them; and that to any extent that such territories should not take water from said source, it would not be deterimental but would be beneficial to said city, as the water supply provided for under said Act will, as is estimated by water supply engineers, be sufficient to supply the demands of the territories now supplied by the water works of said city only until about the year 1965; and that said City Council had power to accept said Act by virtue of either its public legislative powers or its

private powers or both under Section 11 of the Charter of said city set forth in terms.

Therefore it is seen that the possible supply benefit extended to communities outside of the City of Providence is small and incidental to the main purpose and large benefit afforded the city under the Act.

B.

The Legislature May Properly Impose Reasonable Conditions in Granting Such a Franchise.

The legislature may properly impose reasonable conditions upon granting so valuable a franchise, and the Supreme Court of Rhode Island so held in *Joslin Manufacturing Company* vs. *Clarke, City Treasurer* (Appendix, Part Four, p. 49), saying:—

> "The provision thus made by the legislature for the communities whose source of water supply is taken away, in whole or in part, is reasonable and just, and if the City of Providence desires to secure the advantage of the Act it is clear that the legislature has the power to impose reasonable conditions upon the city."

People ex rel. Lasher vs. *City of New York* (1909), 134 App. Div. (N. Y., 75, 78-9.

> "The right of eminent domain forms no part of that body of political and civil rights which are protected and secured by the Federal Constitution. No municipality or other corporation has an inherent right to the power. It is an attribute of sovereignty. It belongs to the State, and with the conditions the State may impose for the gift or grant the United States, a separate sovereignty, has no right to interfere.—The Legislature as the depository of this sovereign power is the sole judge of the expediency and necessity of the exercise of the power and the extent to which the exercise of it shall be carried and the propriety and utility of the conditions to be imposed—it may impose any conditions on the grant of the power, whether precedent or

subsequent, which it believes to be equitable, or it may deny the right absolutely.

"I am therefore of the opinion that the fourteenth amendment has no application. But if it were not so, if the condition was a violation of the Federal or State Constitution, the city could not take advantage of the invalidity, for the city took the right of eminent domain with the condition among others that it should pay the damages to an established business. The Act was not mandatory. It conferred a privilege which the defendants were at liberty to exercise or not, as they saw fit. By accepting the power conferred by the statute and taking the land upon which the business was conducted under it they agreed to the conditions and have no standing to raise the question of constitutionality."

1 *Lewis Eminent Domain*, Sec. 410.

4 *McQuillin Mun. Corp.*, Sec. 1458, p. 3077.

C.

Taxpayers as Such in No Way Represent the Public Interests, and to Overthrow Such a Statute Must Show a Fraud Upon, and Illegal Exaction from, the City.

Taxpayers as such in no way represent the public interests, and the mere claim that their financial interests possibly may be affected to some extent by an act is not sufficient for their intervention, and in order to overthrow such an act as this as unconstitutional they must clearly show *at least* that it does not reasonably subserve the interests of the city; that its main purpose and effect is to benefit other communities at the expense of the city; and that under the Act there is such a manifestly gross disparity between the burdens and the benefits to the city and to the other communities in favor of the other communities as to constitute such a clearly unjust imposition by the legislature upon the city as would operate as a fraud upon, and illegal ejection from, the city and its taxpayers in favor of the other communities.

In this case there was no imposition upon the city as the Act in all its fundamental financial aspects is permissive only, and any inequitable result is negatived by the fact of the acceptance of the Act by the city.

5 *McQuillin Mun. Corp.*, Sec. 2575, p. 5316.

Brummit et al. v. *Ogden Waterworks Co. et al.* (1908), 33 Utah 285, 296.

"Where a city is acting within its authorized power, a taxpayer may not arrest its acts merely because such acts will be unwise, improvident or extravagant; nor may he do this in any matter that is purely legislative or discretionary."

Town of Tahlequah vs. *Guinn et al.* (1904), 5 Ind. Ter. 497.

An ordinance granting a franchise to a water company in order to obtain a water supply for the town, within the power of the corporation and not *ultra vires*, cannot be questioned by its citizens as taxpayers.

In the absence of a showing of gross wrong, courts will not inquire into the reasonableness of ordinances or contracts of a municipal corporation, especially where such ordinance is one expressly authorized by law, and in such case a court of equity will not interfere by injunction.

Wells vs. *Atlanta* (1870), 43 Ga. 67, 78.

"We see nothing in the case charges made of fraud and corruption. They are entirely too vague to justify any serious consideration by a Court. Whether the contract be a wise one or not, whether the city needs waterworks, and what plan is most in harmony with the city wants and with economy, are matters exclusively within the cognizance of the body clothed by the charter with the exercise of the powers of the city. It would be an improper interference by the courts with the rights of the city, for them to undertake to judge of the expediency of this contract. If its provisions were so shockingly outrageous as to furnish a strong

presumption of fraud, that might be an element for consideration, but it would only be proper as a proof of fraud, in connection with other proofs for the courts to inquire at all into the propriety of the contract."

Lewis vs. *City of Providence* (1871), 10 R. I. 97, 101.
A taxpayer's bill.

"We do not think the city council are to be controlled in the exercise of their discretion in purchasing what they may deem useful to the public interest, as to what they shall purchase, for what price, what particular public interest it is intended to subserve; or to what extent it will subserve that interest. It is only necessary that the purpose of the purchase and payment shall be to serve some public interest, and not for a purpose and that a sole purpose foreign to it."

New Orleans vs. *N. O. Water Works Co.* (1891), 142 U. S. 79, 93.

"(4) Little need be said with regard to the appeal of Conery and the other taxpayers; they sue in the right of the city, the rights of the city are their rights, and they have no other or greater rights upon this appeal than has the city. Indeed the city has, in its amended and supplementary answer, joined with them in the assertion of its rights and they are bound by the disposition of the case against it."

Moore vs. *City of Walla Walla et al.* (1894), 60 Fed. 961.

A taxpayer's bill. Held:

Where a city has power under its charter to construct water works, the fact that, by so doing, it would violate contract rights of an existing water company, gives individual property owners no right to enjoin it on the ground that their taxes would be increased thereby.

City of Henderson vs. *Young* (1904), 119 Ky. 224, 227.
Taxpayers' bill to prevent furnishing electric lights outside the city limits.

"A City has two classes of powers—one legislative and governmental, in the exercise of which it is a sovereignty and governs its people; and in the exercise of this class of powers the statute must be strictly construed. The other class of powers is conferred upon it for the purpose, not of government, but for private advantage to the City and its inhabitants. In the exercise of these powers, it is governed by the same rules that govern private individuals or corporations. See Dillon's Municipal Corporations (3d Ed.) 36, and authorities cited in note. In the management and operation of its electric plant a city is not exercising its governmental or legislative powers, but its business powers, and may conduct it in the manner which promises the greatest benefit to the city and its inhabitants in the judgment of the city council; and it is not within the province of the court to interfere with the reasonable discretion of the council in such matters."

Matter of Mayor, etc., of New York, 99 N. Y. 570, 584-5.

One of the appellants complained as a taxpayer.

"6. A final question presented is more serious than those already considered, and comes to us in a double form. It is first said that the legislature has no power to compel a municipality to incur a debt against its will for purposes like those which the act aims to accomplish; and then that the purchase of land for public parks outside of the corporate boundaries is not a 'city purpose' and so the creation of a debt for such purchase is forbidden by the Constitution.

"The first of these questions is not here. The city stands before us not objecting but assenting. Through its proper representatives it came to the Court asking for the appointment of commissioners, and saying that it desired to avail itself of the provisions of the act; and it is here by the corporation counsel and his associates defending the enactment.—We must go by the record, and that shows that no debt is being imposed on the city against its will; and whatever there may be of that question is not in the case."

Aldrich vs. *Tripp,* 11 R. I. 141, 145-6.

This case cites with approval *Bailey* vs. *The Mayor, etc., of New York,* 3 Hill N. Y. 531, relative to the negligent construction of a dam for a water works, and referring to the above case the court said:—

> "It was held that the powers conferred upon the City by the Act were a private franchise granted as well for the emolument and advantage of the city as for the public good, and that the city, by voluntarily accepting the powers, adopted the commissioners appointed by the state as its own agents for carrying on the work. The city was accordingly held to be liable for the injury complained of.
>
> "These cases show that a city or town which is charged with a public duty in consideration of valuable privileges is liable to indemnify an individual who suffers any special injury from a neglect of the duty.—"

Prince et al. vs. *Crocker et al.,* 166 Mass. 347, 357.

This was a taxpayer's bill to enjoin the Boston Transit Commission on the ground that the Boston subway act was unconstitutional because it interfered with the control of the streets and local self government, and would cause an indebtedness of many millions of dollars without the authority of the city council or the consent of the taxpaying citizens, although the act had been accepted by a majority of the voters of the city.

The Court held, at p. 360:—

> "It is not material that the work is not put in charge of the street commissioners of the city. The legislature might provide for doing the work at the expense of the city, but through other agents than those regularly appointed by the city; it might impose liability on the city, incur the expense and require payment by the city. The acceptance of the act by the City precludes objection on this score, even if such objection would otherwise have been open.
>
> "The foregoing considerations apply to the bridge over Charles River, provided for in Sec. 30, as well as to the subway itself.

p. 361. "The plaintiffs also contend that the statute is in violation of the Fourteenth Amendment to the Constitution of the United States. This objection is not dwelt upon in argument, and it is enough to say that we think it is unfounded."

Merrick et al. vs. *Inhabitants of Amherst et al.*, 12 Allen (Mass.) 500.

A taxpayer's bill to restrain the town from raising and expending $50,000 in aid of the Massachusetts Agricultural College to be located in the town, as authorized by act, but the tax not to be laid unless assented to by two-thirds of the voters.

The Court said, pp. 506-7:—

"We do not mean to say that the usual presumption in favor of the validity of an act of the legislature would not have been sufficient to warrant us in assuming in the absence of anything in the subject matter or in the facts before us to lead to an opposite conclusion, that there were special benefits and advantages likely to accrue to the town of Amherst and its inhabitants from the location of the college within its limits to counter balance the additional burden of taxation which the act imposed. But in view of the averments of the petition and the condition upon which the tax was to be laid, no resort to such presumption in favor of the validity of the action of the legislature is necessary."

McCutcheon v. *Terminal Station Commission of City of Buffalo* (1916), 217 N. Y. 127; 111 N. E. 661.

In a taxpayers' action to restrain the execution of a contract between the Buffalo terminal station commission, created by Laws 1911, c. 842, and railroad companies to effectuate plans for railway terminals and the elimination of grade crossings, adopted after public hearing by all but one of the commissioners in substantial conformity to plans approved by the public service commission after investigation, the court cannot substitute its judgment for that of the com-

mission in weighing against each other mere advantages and disadvantages accruing to the city from the contract, but the city is bound by the acts of the commission acting within the authority of the statute, and in good faith and free from fraud or corruption.

Voelcker v. *Schnell, Mayor, et al.* (1917), 166 N. Y. Supp. 420, 425.

In this case the plaintiff, a taxpayer in the City of Tonawanda, sought an injunction against the mayor of said city to prevent him from executing a lease of certain property to be used by municipal officers, on the ground that there was a valid lease of other quarters then existing, and that the execution of the proposed lease would result in a waste of the public funds. In the opinion dismissing the complaint the court said:

"The plaintiff asserts that he, as a taxpayer, has been injured; that his property will be subjected to taxation for illegal and wasteful purposes, unless the defendant mayor is restrained from executing the defendant bank's lease to the city. The waste to be prevented by a taxpayer's action is confined to cases where the acts complained of are without power, or where corruption, fraud or bad faith amounting to fraud, is charged.—"

D.

A Municipality Has the Power to Expend Money for a Public Purpose of the Municipality, Although Benefit be Conferred Upon Communities Outside the Municipal Territory.

Hall Constitutional Law, pp. 187-8:—

"Nor is it an objection that the public improvement for the creation of which a taxing district has been established, will also benefit persons and property outside of the taxing district.

"The only limit suggested upon this doctrine is in such gross cases as were put by the court. For instance, if the general expenses of the government of the state, or one of its municipal divisions, should be levied upon the property of an individual or set of individuals, or perhaps upon a particular district. Cases of this kind might be imagined in which an act would fall within the express prohibitions of the constitution. But to raise the constitutional question would require an extreme case, where one district should be confessedly and arbitrarily required to pay for benefits conferred upon others who bore no proportion of the burden. No such question arises where a tax is imposed upon a particular locality to aid in a public purpose which the legislature may reasonably regard as a benefit to that locality as well as to the state at large. But taxation of one district for improvements located in and substantially beneficial only to another district would be invalid."

People ex. rel. Murphy vs. *Kelly* (1879), 76 N. Y. 475, 487-8.

Relative to the Act providing for a bridge between New York and Brooklyn the court said:—

"It would be a city purpose to purchase a supply of water outside of the city, and convey it into the city, and for such a purpose a city debt could be created.

"It would have been a city purpose if either city had been authorized to build the whole of the bridge, and it is no less so that both are to unite in building it."

Admiral Realty Co. v. The City of New York et al. (1912), 216 N. Y. 110, 114, 117.

The actions were brought by taxpayers to restrain the execution by the city of New York, its officials, and the members of the public service commission for the first district, of two contracts, one with the Interborough Rapid Transit Company and the other with the Brooklyn Union Elevated Railroad Company, for the construction, equipment and operation of subway and elevated railroads. The claim was made that they and the Rapid Transit Act under which they

were to be executed would violate the provisions of the Constitution against the gift by a city of any money or property or loan by it of money or credit to or in aid of any individual, association or corporation.

The contract to be made with the Brooklyn Union Elevated Railroad Company would provide for the construction of a subway in the city of Brooklyn, costing in the neighborhood of $100,000,000, to be paid for by and belong to the city of New York. The court held that there was no violation of said constitutional provision. In this important case it was not even suggested that there was any constitutional objection because the subways to be built would be largely outside the city of New York and would be also of benefit to Brooklyn and its inhabitants.

Gelpecke vs. *City of Dubuque*, 1 Wall. 175; 17 L. ed. 522, 525.

Relative to issuing bonds in aid of railroads, the court said:—

> "Where there is no defect of constitutional power, such legislation in cases like this is valid. This question with reference to a statute containing similar provisions came under the consideration of the Supreme Court of Iowa in *McMillen* v. *Boyles*, 6 Ia. 305 and again in *McMillen* v. *Co. Judge*, 6 Ia. 393; *Williston* v. *Leland*, 2 Pet. 627; *Satterlee* v. *Mathewson*, 2 Pet. 300; *Balt. & S. R. R. Co.* v. *Nesbit*, 10 How. 395; *Whitewater Can Co.* v. *Vallette*, 21 How. 425; *Watson* v. *Mercer*, 8 Pet. 88; The validity of the Act was sustained. Without these rulings we should entertain no doubt upon the subject."

Savannah vs. *Kelly*, 108 U. S. 184, 187; 27 L. ed. 696, 697, held to the same effect.

Sedgwick on Statutory and Constitutional Law, p. 505:—

Acts authorizing municipal corporations to subscribe to the stocks of railroad corporations are held not a taking of

private property for public use without just compensation, because though the property of the citizen may be more heavily taxed than before, it is not taken, and that the acts of this kind fall within the scope of the legislative power to permit the appropriation of a local tax within the consent of the local authorities.

Peabody vs. *Westerly Water Works* (1897), 20 R. I. 176.

This was a taxpayer's bill to restrain the Town of Westerly from purchasing under legislative authority from a private corporation a system of water works located partly in Rhode Island and partly in Connecticut, on the grounds, first, that the purchase would be *ultra vires*, and, second, that the Westerly Water Works could not sell nor the town acquire the portion of the plant of the former with its franchises, etc., situated in the Towns of Stonington and North Stonington in the State of Connecticut, and, fourth, that the town could not purchase the same to be paid for by a tax levied on all the taxable property of the town because such action would be in conflict with Const. R. I. Art. I, Secs. 2, 5, 10, 16, and with the amendment, Art. 14, Sec. 1 to Const. U. S., the property of the complainant Sweeney and of other taxpayers outside of the limits of the Westerly Fire District being in no manner benefited by the water works and therefore not liable to be taxed therefor.

The court held:

"1. As to the claim that the proposed purchase and sale are ultra vires, it is necessary only to refer to the Act of the General Assembly of May 26, 1897, expressly authorizing the Westerly Water Works to sell, and the town of Westerly to purchase, all or any of the lands, water, water rights, estates, real, personal or mixed, property contracts, franchises, rights and privileges of the former, and whether situated, held, enjoyed or exercised by it within or without the State of Rhode Island.

"2. The claim that the Water Works cannot sell, nor the town acquire, that portion of the plant of the former situated in the towns of Stonington and North Stonington, Connecticut, rests on the assumption that the right granted by the legislature of Connecticut to the Water Works to construct and maintain that portion of its plant in that State is merely a revocable license specially conferred on the Water Works. Granting this to be true, it is not to be assumed that the legislature of Connecticut will arbitrarily revoke the license because of a change of ownership from the Water Works to the town. No reason is shown why the ownership of the plant by the town of Westerly instead of by the Water Works should be deemed objectionable by the legislature of Connecticut. Moreover the Charter of the Westerly Water Works expressly provides for a sale of its plant to the town, and it is not improbable that that provision was known to the legislature of Connecticut when it granted the license and the possibility of such a sale was contemplated in granting the license.

"4. We see no constitutional objection to the proposed action on the ground of inequality of benefits to be derived by tax-payers resident in different parts of the town. It is assumed by the complainants that only those who are residents within the limits of the Westerly Fire District will be benefited by the purchase. The authority however to the town to make the purchase, and the vote of the town, contemplates the acquisition of a water works system for the town, not merely for the fire district, and we cannot assume that its benefits will not be extended beyond the limits of the fire district as rapidly as can reasonably be done."

McMurray v. *Kansas City et al.* (1920), 283 Mo. 479, 492-4; 223 S. W. 615, 619.

Suit to enjoin the city and others from constructing a sewer. Decree for defendants and plaintiff appealed. Affirmed.

The complainant brought the suit to enjoin the construction of a joint district sewer in Kansas City, Missouri, the outlet or termination of which was to be in the State of Kansas. He was a property owner in the joint sewer dis-

trict in said Kansas City whose land would be subject to assessment for its proportionate part of the cost of the work. The City Charter authorized the City Council to establish and keep in repair sewers and sewer outlets within or without the City, and the people of the City had adopted a charter amendment authorizing the City to build the outlet of the sewer in question and other works outside the state.

The sewer outlet for a distance of 447 feet, at an estimated cost of $347,500, was to be constructed not only beyond the city limits, but outside the State of Missouri. It was also contended that the sewer would provide drainage facilities for about 250 acres of land in the City of Rosedale in the State of Kansas and that the burden of caring for this drainage should not be assessed against the owners of land in the joint sewer district in said Kansas City. It was further contended that lateral sewers of the extent provided for are necessary appurtenances to joint district sewers and that the districts in which the former are located should bear their proportionate share of the cost of the latter, instead of assessing said cost against the property alone within said joint sewer district.

The court said:—

> "The only limitations upon the right of a city in the exercise of its charter powers to establish sewer districts and provide for the construction of sewers therein is that acts or ordinances in furtherance of such power shall not be creatures of fraud, whim, or caprice or in violation of common right, or impose a burden on the citizen or the community without any corresponding benefit. Absent these limitations, and the courts with uniformity recognize the public necessity of sewer systems for municipalities, and are loath to interfere with the exercise of their power in that behalf. * * *
>
> "The courts, conscious of these facts, of which they cannot but take judicial notice, have, as is evident from their rulings, striven, without unduly straining municipal power,

to sustain and encourage plans for the construction of sewer systems. In so doing the end sought to be effected is classified as of like public importance with that of the building and lighting of streets, the establishment and maintenance of a means for supplying water, and the removal of garbage. The conclusion, therefore, reasonably deductible from the foregoing, is that municipalities in the exercise of their powers in such matters of public importance as we have indicated are in addition to the mere power to act, vested with a discretion not subject to review by the courts, unless it is affirmatively shown to have been exercised arbitrarily, fraudulently, or oppressively."

Haeussler v. *City of St. Louis* (1907), 205 Mo. 656, 681. This was a suit by taxpayers to enjoin St. Louis from issuing $3,500,000. bonds to obtain funds for the construction by it of a bridge across the Mississippi river, on the ground that it would violate constitutional provisions forbidding cities to appropriate money or lend their credit to or in aid of any individual, association or corporation. The relevant state statute authorized the building of bridges or tunnels over or under rivers in Missouri or those forming a boundary between Missouri and other states, for public use by railroads, street cars, vehicles of all kinds and pedestrians. The Federal act authorized the City to build the bridge and to condemn therefor real and personal property in both Missouri and Illinois. The City Charter authorized the acquisition of real or personal property within the city and beyond the limits of the city for certain purposes "or for any other purpose."

The Court in holding the project legal, although it manifestly would be of great benefit to the inhabitants of Illinois as well as those of St. Louis and Missouri, said:—

"The right to construct bridges over rivers and streams separating two cities or towns, by one or both of the municipalities concerned, has been recognized as a public city purpose. Nor is it any the less a city purpose because a part of the public highway is located beyond the city limits."

County of Mobile vs. *Kimball* (1880), 102 U. S. 691.

The act provided for improving the river, bay and harbor of Mobile and the expense was imposed upon the County of Mobile.

"Here the objection urged is that it fastens upon one County the expense of an improvement for the benefit of the whole State. Assuming this to be so, it is not an objection which destroys its validity. When any public work is authorized, it rests with the Legislature, unless restrained by constitutional provisions, to determine in what manner the means to defray its cost shall be raised. It may apportion the burden ratably among all the counties, or other particular sub-divisions of the State, or lay the greater share or the whole upon that county or portion of the State specially and immediately benefited by the expenditure.

"It may be that the Act in imposing upon the County of Mobile the entire burden of improving the river, bay and harbor of Mobile is harsh and oppressive, and that it would have been more just to the people of the County if the Legislature had apportioned the expenses of the improvement, which was to benefit the whole state; among all its counties. But this Court is not a harbor, in which the people of a city or county can find a refuge from ill-advised, unequal and oppressive state legislation. The judicial power of the Federal Government can only be invoked when some right under the Constitution, laws or treaties of the United States is invaded."

Henderson Bridge Co. vs. *Henderson* (1898), 173 U. S. 592, 615.

"But in order to bring taxation imposed by a state or under its authority within the scope of the Fourteenth Amendment of the National Constitution the case should be so clearly and palpably an illegal encroachment upon private rights as to leave no doubt that such taxation by its necessary operation is really spoliation under the guise of exerting the power to tax. As an act of Congress should not be declared unconstitutional unless its repugnancy to the supreme law of the land is too clear to admit of dispute, so a local regulation under which taxes are imposed should not be held by the Courts of the Union to be inconsistent with

the National Constitution unless that conclusion be unavoidable. All doubt as to the validity of legislative enactments must be resolved, if possible, in favor of the binding force of such enactments."

Davidson vs. *New Orleans* (1878), 96 U. S. 97.

Held that an assessment being unequal as regards the benefits conferred does not violate the 14th Amendment as it imposes no restraint against unequal taxation.

Williams vs. *Eggleston* (1897), 170 U. S. 304, 310.

(Headnote) "A state law directing that five towns shall maintain a bridge and highway, each bearing a share in the expense thereof, and treating them a body corporate, under a particular name, for the care and maintenance of the bridge and highway, does not deprive of property without due process of law."

"Whatever may have been the practice of the state in the past, it cannot be doubted that the power of the legislature over all local municipal corporations is unlimited save by the restrictions of the State and Federal Constitution."

Guthrie Nat. Bank vs. *Guthrie* (1898), 173 U. S. 528, 536.

The territorial legislature has the power to compel any of its political subdivisions to recognize claims founded upon equity and justice, although not of legal obligation.

"It is a legislative power and it was granted to the territorial legislature by the acts already referred to. A city is a municipal corporation and a political subdivision of the state, and what the state could do itself it has the power to direct its agent, the municipality, to do."

POINT III.

The Provision of Said Section 18 That, in Case of a Failure to Agree Upon the Fair Wholesale Rates for Water Taken for the Supply of Said Outside Communities Having No Other Public Water Supply, the Same Shall be Determined by Arbitration, Does Not Violate Due Process of Law.

This provision involves a determination of questions of fact only, and any arbitrary or unreasonable finding would be subject to review by the Court. Arbitrations to determine matters of fact are frequently provided for in statutes, and often at the request of the parties in interest, or such a provision is accepted by them as would be the case here.

Russell on Arbitration and Award (10th Ed.), pp. 8-11.

As is frequently stated by the authorities and held in the cases, the legislature has a wide discretion in providing for and regulating the public interests, and with the exercise of that discretion the courts will not interfere except for manifest and gross abuse. In view of the control of the legislature over the municipal subdivisions of the state, it would appear that the legislature can prescribe an exclusive mode of determining in such a case as this such matters of fact, but if not and the court should determine the same, it would not affect the substance of the provision, but only the mode of determining the relevant facts, and would not otherwise affect said Section 18.

POINT IV.

If the Provisions of Said Section 18, or Some Particular Provision or Provisions Thereof, Were Held to Conflict With Said Fourteenth Amendment, They Are Separable and Would Not Affect the Main Provisions of Said Act.

In *Joslin Manufacturing Company* vs. *Clarke, City Treasurer,* Appendix, Part Four, p. 49, the Rhode Island Supreme Court referring to said Section 18 said:—

> "These provisions are severable from the remainder of the act and their validity can be determined later if questioned by anyone whose rights are affected thereby. The provisions of Section 18 are permissive in their nature and not obligatory upon the municipalities who are entitled to re-

ceive the water. It is probable that in the future some, if not all of these rights will be exercised by the different communities, but the defendants, however, at the present time, before even the dam and reservoir are completed, have no such interest in the provisions in questions as will enable them to test the constitutionality of these provisions. In *City of Newport* vs. *Horton*, 22 R. I. 196, this court affirmed the principle as stated in *State* vs. *Snow*, 3 R. I. 64, that no one can take advantage of the unconstitutionality of an act who has no interest in and is not affected by it. The application of this principle disposes likewise of the objections to the provisions of the act in regard to special compensation for the cost of moving machinery, etc."

The above holding that said provisions are severable, accords with the decisions of the courts generally and of this court.

POINT V.

The Cases Cited by the Plaintiffs in Error Relative to Said Section 18 Either Do Not Appear to be in Point or Were Cases Where a Real Adverse Burden Was Laid by the Act, Which Not Only Was Not Accepted but Was Resisted by the Public Authorities or the District Objecting.

We know of no case and no principle of law which applied to this Act would give ground for setting the Act or Section 18 thereof aside as unconstitutional on the ground of an illegal burden being imposed by the Act or said Section 18 upon the taxpayers of the city for the benefit of the other communities specified in said Section 18.

ISSUE 6.

The Provision of Section 16 of Said Act, Permitting the Owner of a Business Established Prior but Not Subsequent to the Passage of Said Act to Recover Damages to Such Business Caused by the Taking of Lands and Water Rights, Does Not Violate the "Equal Protection" Clause of Said Fourteenth Amendment.

The Joslin Manufacturing Company in paragraph 57, and the Scituate Light & Power Company in paragraph 60 of their respective bills, allege that the Act is unconstitutional and void in that it denies to persons within the jurisdiction of Rhode Island the equal protection of the laws within the meaning of said Fourteenth Amendment, in that the Act provides that under given conditions damages may be recovered for a business established prior to the date of the passage of the Act, but does not provide for any recovery in case the business be established subsequent to the date of the passage of the Act but prior to any condemnation under it.

POINT I.

The Plaintiffs in Error Do Not Show Any Legal Interest in the Question.

A careful examination of the bills wherein this contention is made, fails to disclose any sufficient claim on the part of either complainant that it is the owner of a business established between the date of the passage of this Act and "before the said city took any action under said Act to acquire or take any lands or water thereunder." The only allegation whatever in this connection is found in the latter part of each of the two paragraphs referred to, and in each is as follows:

> "And your orator says there are numerous cases of business established in good faith within said area after the passage of said act, but before the condemnation of land by the city of Providence."

This allegation says no more than that a stranger to the present causes may perchance be grieved or injured in the manner suggested. The allegation that there are numerous cases of business established within said period of time is not an allegation that the complainant owns a business thus established.

Whitehouse Equity Practice, p. 185.

The complainants, therefore, set forth no interests in respect to this provision of the Act that entitle them to invoke a decision of this court on the constitutionality thereof.

In *City of Newport et al.* vs. *Horton et* al. (1900), 22 R. R. 196, the court said:—

> "In *State* vs. *Snow*, 3 R. I. 64, where a part of the act in question, which related to another offence than that charged against the defendant, was claimed to be invalid, Judge Brayton said that it was a very wholesome rule that no one can take advantage of the unconstitutionality of an act who has no interest in and is not affected by it. This language related to provisions of the act which did not affect the party who objected to them in the case before the court.
>
> "The rule as stated, Cooley's Cons. Lim. (6th ed.) 214, is that a law will not be held invalid on the objection of a party whose interests are not affected by it in a manner which the constitution forbids."

In Penniman's case (*supra*) the court said:—

> "It is only necessary to consider that part of Section 1 of the act above recited which relieves a party from imprisonment upon an execution issued on a judgment obtained against a corporation in which he is a stockholder. The defendant in error invokes that provision of the statute and no other."

In the case of *Steamship Co.* vs. *Emigration Comrs.* (1884), 113 U. S. 33, 39; 28 L. ed. 899, the court said:—

> "If, on the other hand, we should assume the plaintiff's case to be within the terms of the statute, we should have to deal with it purely as a hypothesis, and pass upon the constitutionality of an Act of Congress as an abstract question. That is not the mode in which this court is accustomed or willing to consider such questions. It has no jurisdiction to pronounce any statute, either of the State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the

exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. These rules are safe guides to sound judgment. It is the dictate of wisdom to follow them closely and carefully."

Cooley Constitutional Limitations, 7th Ed. 231, 232.

State, ex rel vs. *Blake* (1911), 241 Mo. 100; 144 S. W. 1094.

In re Wellington (1834), 16 Pick. (Mass.), 87; 26 Am. Dec. 631.

In the latter case the court said:—

"But whether or not a case can be imagined, in which an act of the legislature can be deemed absolutely void, we think it quite clear, that when such act is alleged to be void, on the ground that it exceeds the just limits of legislative power, and thus injuriously affects the rights of others, it is to be deemed void only in respect to those particulars, and as against those persons, whose rights are thus affected."

POINT II.

There Is No Denial of the Equal Protection of the Laws.

Even if the complainants had alleged a sufficient interest to entitle them to invoke a constitutional construction with reference to this provision of the Act, there is no denial by this provision of the equal protection of the laws within the meaning of the Fourteenth Amendment to the Constitution of the United States.

A.

The Equal Protection Clause of Said Fourteenth Amendment Does Not Apply to Said Section Giving a Right to Recover Business Damages.

In the absence of an express statutory requirement, damages to a business located on or near land taken by condemnation are not recoverable.

Because of the control which a state has over its municipalities and as one of the terms or conditions of the power granted, it was competent for the state to provide that an owner who had a business located on land in the town of Scituate or on the north branch of the Pawtuxet River, established prior to the passage of the Act, could recover damages to such business from the city. Yet in the absence of an express statutory or express constitutional requirement, damages to a business or the good will thereof caused by the taking of physical property have generally been held too uncertain and too speculative to be recoverable. Business as such is not considered to be property in eminent domain proceedings or within the meaning of the word "property" as used in constitutional provisions requiring compensation to be made for the taking of "property," and therefore damages to a business are not recoverable, except so far as an enabling statute or constitutional provision expressly authorizes recovery.

In a leading case, *Sawyer* vs. *Commonwealth* (1902), 182 Mass. 245; 65 N. E. 52, Holmes, C. J., said:

> "This is a petition for the determination of damages caused by a decrease in value of the petitioners' business in consequence of the carrying out of the metropolitan water supply act. Stat. 1895, chap. 488, Sec. 14. After the decision in *Sawyer* vs. *Metropolitan Water Board*, 178 Mass. 267, the case was referred to a commission upon the present petition, and the petitioners, being dissatisfied with the determination, again claim a trial by jury—this time under Sec. 15 of the act. The material words are as follows: 'Said water board, or *any person whose property is taken* under the right of eminent domain, or entered upon or injured by the taking of said water, if dissatisfied with any determination of damages made by any commission, may . . . claim a

trial by jury,' etc. The question is whether the petitioners come within these words, and have the right which they claim.

"A majority of the court is of opinion that the petitioners are not entitled to a jury. If indeed the loss which they have suffered were within the protection of the Constitution, there would be the strongest reason for construing the statute as giving them whatever rights the Constitution secures, but it hardly would be contended that the Constitution is concerned. It generally has been assumed, we think, that injury to a business is not an appropriation of property which must be paid for. There are many serious pecuniary injuries which may be inflicted without compensation. It would be impracticable to forbid all laws which might result in such damages, unless they provided a *quid pro quo*. No doubt a business may be property in a broad sense of the word, and property of great value. It may be assumed for the purposes of this case that there might be such a taking of it as required compensation. *But a business is less tangible in nature and more uncertain in its vicissitudes than the rights which the Constitution undertakes absolutely to protect.* It seems to us, in like manner, that the diminution of its value is a vaguer injury than the taking or appropriation with which the Constitution deals."

In the case of *Whiting* vs. *Commonwealth* (1907), 196 Mass. 468; 82 N. E. 670, it was held that a loss of business is not an element of damage in taking under eminent domain unless made so by express statutory provision, and that a statute was not unconstitutional because it provided that one whose property was taken for a certain public purpose should not recover damages for loss of business, although persons differently situated were allowed to recover such damages.

In *Cox* vs. *Philadelphia H. & P. R. Co.* (1906), 215 Pa. 506; 64 Atl. 729, the court said that it was a settled rule which had been recognized and enforced for more than three-quarters of a century in that state, that a land owner could not have the profits of his business considered in determining

the value of the property which was affected or injured by the taking.

In *City of Oakland* vs. *Pacific Coast Lumber & Mill Co.* (1915), Cal. 153, Pac. 705, 707, it was said:

> "It is quite within the power of the Legislature to declare that a damage to that form of property known as business or the good will of a business shall be compensated for; but, unless the Constitution or the Legislature has so declared, it is the universal rule of construction that an injury or inconvenience to a business is *damnum absque* and does not form an element of the compensating damages to be awarded."

Lewis on Eminent Domain, 3rd ed., Vol. 2, Section 727, p. 1271, states the law as follows relative to the injury to a business situated upon land taken by condemnation:

> "While it is proper to show how the property is used, is is incompetent to go into the profits of the business carried on upon the property. No damages can be allowed for injury to business. The reason is that the constitution and the statutes, as ordinarily worded, require only that just compensation shall be made for the property taken. Just compensation, as we have already seen, where an entire property is taken, is the market value of the property, and where a part is taken, it is the value of the part taken and damages to the remainder by the taking and use of the part for the purpose proposed. The business conducted upon the property is not taken and the owner can remove it to a new location or continue it upon the part of the property which remains. Any incidental loss or inconvenience in business, which may result from a removal or change consequent upon the taking, must be borne by the owner for the sake of the general good in which he participates. In a few instances the statute has expressly provided that compensation should be made for injury to business."

Nichols on Eminent Domain, 2d ed., Sec. 124, 229.
Sutherland Damages, 4th ed., Vol. 4, Sec. 1071.

Hunter, Admr., vs. *Chesapeake & O. R. Co.* (1907), 107 Vo. 158; 59 S. E. 415.

Kossler vs. *Pittsburgh Ry. Co.* (1904), 208 Pa. St. 50; 57 Atl. 66.

Pause vs. *City of Atlanta* (1895), 98 Ga. 92, 105.

In re Mt. Washington (1857), 35 N. H. 134, 147.

Metropolitan Bd. of Works vs. *McCarthy* (1874), L. R. 7 H. L. 243.

Since business in this connection is not property in a constitutional sense, it is proper to allow in the Act recovery for damages to a business established prior to the passage of the Act, but to withhold such recovery as to business established subsequent thereto.

A fundamental reason for reaching this conclusion is the recognition of the principle that the provision of the Fourteenth Amendment, "nor shall any state * * * deny to any person within its jurisdiction the equal protection of the laws," creates no new rights in the individual. It is a limitation only upon the state dealing arbitrarily with the classes or kinds of rights recognized under the law of a given jurisdiction at the time of the adoption of the Fourteenth Amendment.

Civil Rights Cases (1883), 109 U. S. 3; 27 L. ed. 835.

United States vs. *Cruikshank* (1875), 92 U. S. 542; 23 L. ed. 588.

The amendment simply guarantees that no state shall deny the equal protection of these rights among a class similarly situated. If the state creates a new right of recovery against a municipality, it is not dealing with any such right and therefore one not receiving such benefits can raise no objection under the provisions of the Fourteenth Amendment. There has been no unequal protection of vested rights, no unequal burden imposed, but only a new liability created.

Hannis Taylor, in his work on Due Process of Law and Equal Protection of the Laws, says in Section 229:

"It is all-important to keep steadily in view the foregoing distinctions between vested rights and such expectancies, possibilities and contingencies as do not measure up to that standard, because the first question that arises in every case is whether or no the right involved is a vested right, or a right of the contingent class below that standard. If the right is vested, then the next question that arises is whether or no there has been such an arbitrary interference with such a fundamental right as will bring the infraction within the due process clauses of the Constitution."

In the case of *Davis* vs. *Commonwealth* (1897), 167 U. S. 43; 42 L. ed. 71, the court was dealing with the question as to whether, in view of the fact that no citizen of Boston had a vested right to use the Boston Common, it was a violation of the Fourteenth Amendment of the Constitution of the United States to vest the Mayor of that City with the authority to permit such individuals as he saw fit to have the privilege of speaking on the Boston Common. Mr. Justice White, speaking for the court, said:

"The assertion that although it be conceded that the power existed in the state or municipality to absolutely control the use of the Common, the particular ordinance in question is nevertheless void because arbitrary and unreasonable in that it vests in the mayor the power to determine when he will grant a permit, in truth, whilst admitting on the one hand the power to control, on the other denies its existence. The right to absolutely exclude all right to use necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser."

This principle of constitutional interpretation, although the court was considering a statute under a State Constitution and not under said Fourteenth Amendment, was recognized in the case of *Madden* vs. *Lancaster County* (1894), 65 Fed. 188, 194. In that case a Nebraska statute gave a right of action against counties for failure to keep highways and bridges in repair, if brought within thirty days after the injury. The court held that, by the limitation of time for

bringing the action, the constitution of that state was not violated and that the statute did not grant to counties a special immunity, since the county was not in the first instance liable, and the result of the statute was only to create a new liability.

B.

If Said Fourteenth Amendment Did Apply, Said Provision Makes a Reasonable and Necessary Classification.

Even if the Fourteenth Amendment were construed to act as a restriction to be observed in the extension of new privileges, still the provision in question is proper, in that it makes a reasonable and necessary classification.

The Act was drawn to treat fairly and generously the owners of property taken by the city of Providence for its new water supply. Although the law was well established that land could be taken without the payment of damages to the owners of business conducted thereon or in the vicinity, it was nevertheless recognized, where an area so extensive and comprising a large part of the town of Scituate and including several mill villages was within the authorized taking, that established businesses could not be removed to locations near the old ones and might be much more seriously interfered with than in the usual case. Therefore the Act provided for giving to the owner of a business located as therein provided and established prior to the passage of the Act a right of recovery in case his business was damaged.

The Act gave this right in addition to any rights protected by the constitution of the State and of the United States. But in granting this right, it was necessary to confine it to a recovery for such businesses as were already established, as otherwise the Act would have been unfair to the city of Providence by throwing upon the city the burden of damages for businesses established possibly not in good faith and after there was knowledge of the intended appropriation.

Considering the magnitude of the undertaking and the preliminary requirements of the Act, the time afforded for exercising the power to condemn was comparatively short, as Section 28 expressly limits the time within which the city may exercise the power to condemn to the period of two years from and after the date of the passage of the Act. It would have been difficult for the legislature to conceive that there would be any real call for the establishment, in good faith between the date of the enactment and the taking, of businesses in this rural community, where the limits of the area that could be taken were fixed and knowable to all, and where the city was required to act as promptly as practicable considering the magnitude of the undertaking.

The Act establishes only one class and puts in the class all those who had such an established business prior to the date of the passage of the Act. It leaves out of the class all the individuals who on that date had made no investment in such an established business and who, if they established a business after the passage of the Act, would do so with the knowledge that the lands could be taken by the city within the relatively brief period of two years. Further the classification is one for the purpose of bestowing a right not existing apart from the Act, and is not a classification relative to imposing a burden.

Surely, this is an entirely reasonable restriction on the individual and has an obvious and definite relation to a sane, just and economical carrying out of the purpose of the Act. Since there is a reason for the classification, the legislature had full and final authority to determine its expediency.

In *Opinion to the Governor* (1902), 24 R. I. 603, the Supreme Court of Rhode Island said:

> "The mere fact that one class is not embraced in a law when it might be, is not enough of itself to render the law invalid. An example of this is found in *State* vs. *Justus*,

88 N. W. Rep. 759, where the Supreme Court of Minnesota declared an act constitutional which forbade the blacklisting of discharged employees by corporations or partnerships. It was claimed that the law was unequal because it exempted individuals, and that the mischief of blacklisting by an individual was as great as that done by a corporation or partnership. But the court held that the act, being applicable to all members of the class, was not invalid because limited to that class."

In the case of *Whiting* vs. *Commonwealth* (1907), 196 Mass. 468, 470, the court said:

"The petitioner contends that unless the construction for which he argues is given to the statute, Sec. 4 of c. 450, St. 1896, providing that no stockholder in any corporation whose plant is taken on account of a reservoir for the metropolitan water supply shall be entitled to compensation under that act, is unconstitutional, on the ground, as we understand him, that it would constitute an arbitrary and unjust discrimination against a stockholder who might also be an employee. But an employee as such is not entitled to damages for the loss of employment. And the Legislature might well provide that one who is a stockholder and as such entitled to receive compensation for the taking of the property of the corporation shall not be entitled to recover damages for loss of employment. Loss of business is not, generally speaking, an element of damage in a taking by right of eminent domain (*Bailey* vs. *Boston & Providence Railroad*, 182 Mass. 537), *and there is, therefore, nothing unconstitutional in an act which provides that one whose property is taken shall not recover damages for loss of business, even though parties differently situated are allowed to recover therefor.*"

In the case of *Grainger* vs. *Douglas Park Jockey Club* (1906), 148 Federal 513, the court reviews the doctrine of a large number of state and federal decisions relative to the power of a legislature to designate classes and to deal differently with the members of one class from the manner in which it deals with the members of another class. The law in this regard, as recognized by this case and as borne out by the

large number of authorities cited, is well summarized by a brief statement of Judge Sullivan in the case of *State* vs. *Farmers Irr. Co.* (1899), 59 Neb. 1, 4; 80 N. W. 53, and is as follows:

> "Classification to be valid must rest upon some reason of public policy, some substantial difference of situation or circumstances that would naturally suggest the justice or expediency of diverse legislation with respect to the objects classified."

The provision of the Act in question is clearly a separable and independent provision, and were the complainants' contentions upheld, it would simply strike from the Act a fair and generous provision without in any way benefiting the complainants.

An examination of a large number of cases concerning classifications under state statutes, called in question under the equal protection clause of the Fourteenth Amendment, discloses that wherever the classification is not palpably and clearly arbitrary the United States Supreme Court has upheld the classification. Since 1900 the number of such classifications not found valid by this court have been extremely few, and in those cases the classifications were clearly arbitrary and unreasonable. We know of no classification the same as or similar in principle to this, which has been struck down by this court or any other court.

ISSUE 7.

The Provision of Section 12 of Said Act, Allowing an Owner of a Mill Who Has Not Surrendered the Machinery Therein to Recover the Reasonable Cost of Removing Such Machinery to a Point Within but Not Without the New England States, Does Not Conflict With Said Fourteenth Amendment.

In paragraph 57 of the bill of the Joslin Manufacturing Company, and in paragraph 60 of the bill of the Scituate Light & Power Company, the complainant alleges that the said Act is unconstitutional in that it denies to persons within the jurisdiction of Rhode Island the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

> • • • "In that, while it allows any mill owner whose mill is situated on land taken by the City of Providence under said act to recover the reasonable expense and cost of moving his machinery from the old location at said mill to a new location within the New England states, it does not allow a mill owner similarly situated, whose land and mill are taken, to recover any portion of the reasonable expense of moving said machinery to any location without said New England states, irrespective of the needs of his business or the desirability or necessity of such new location or the cost of such moving."

POINT I.

The Plaintiffs in Error Do Not Show Any Legal Interest in Said Question.

An examination of both the said bills of complaint discloses that the complainants have not alleged that they, or any of them, are injured or prejudiced by virtue of the provision in Section 12 relative to the recovery of the cost for removing unsurrendered machinery. The complainants have, in substance, alleged merely knowledge of one instance where it becomes reasonably necessary and proper to remove such machinery to the State of New York. In the last few lines of each of said paragraphs appears the following allegation:

> • • • "And there is at least one case where it becomes reasonably necessary and proper that the machinery should be removed from the mill where it was located to a new location in the State of New York."

There is, of course, no rule of pleading in law or in equity that would permit such an allegation to be treated as an affirmative allegation of a sufficient legal interest on the part of the complainants to raise this question. As has already been set forth the court will not pass upon the constitutionality of a provision of a statute as a hypothetical question. If there be the one instance alleged by the complainants, the party interested may waive, and by this time has waived, any question as to the constitutionality of this provision of the Act. The complainants clearly are not in a position, having alleged no sufficient interest thereunder, to request a determination by this court as to the constitutionality of this provision of the Act.

POINT II.

If the Plaintiffs in Error Had Shown a Legal Interest in Said Question, Said Provision Does Not Deny the Equal Protection of the Laws.

Even if the complainants had alleged a sufficient interest to entitle them to invoke a constitutional construction of the provision of Section 12 relative to recovering the cost of the removal of machinery, still there is no denial by the provision of the equal protection of the laws within the meaning of said Fourteenth Amedment.

A.

Said Provision of Said Section 12 Does Not Create a Classification.

The complainants, in their allegations relative to this provision, endeavor to treat the provision of the Act granting a limited right with reference to the removal of machinery as though it made an improper classification. They allege that the Act allows one mill owner to recover the cost of removing his unsurrendered machinery to a point in the New England

States, but does not allow another mill owner, similarly situated, to recover any part of such cost if the removal be to a place outside of the New England States. There is no classification made, and there was never intended to be, under this provision of the Act. There is in effect simply a limitation upon the extended right to recover. It extends to every mill owner, who has a mill within the area taken, the same right. It says to each mill owner, if you elect not to surrender your machinery within the period of six months allowed you, you can recover from the city of Providence the reasonable cost of removing that machinery to any point within the New England States and "of setting up such machinery in the place therein in which it is to be used by said owner."

This creates a situation where every mill owner affected may or may not avail himself of such recovery, and therefore the provision in no sense amounts to a classification of persons, but is a limitation upon the right extended to all.

Further, even if this extended right could be construed to make a classification, it was competent for the legislature to fix said limitation with reference to this extended right for the reasons hereinbefore presented under Issue 6.

B.

The Issue Is, Did the State Have the Power to Extend Such a Limited Right?

There being no classification, the real issue then is: Did the State have the power to extend a limited right respecting the recovery of the cost of removing personal property from the lands taken by condemnation?

The overwhelming weight of authority recognizes that damages, representing the cost of removing personal prop-

erty from lands taken under eminent domain proceedings, are not recoverable, in the absence of an enabling statute.

In *United States* vs. *Heyers et al.* (1911), 190 Fed. 688, the court said:

> "The committee correctly interpreted the law as I find it to be, disregarding all evidence touching the question of special damage to the tenants, Berne and Huber, which might grow out of taking down, carrying away, and setting up again in a new location, the fixtures in their stores, which they had the right to remove, together with loss of profits during the cessation of business resulting from such removal. What the damage would have been, if said testimony had been taken into account, is therefore immaterial, and the alternative part of the report is of no service to the court.
>
> "Let judgment be entered, based upon the original finding of the committee."

In *Jackson* vs. *State* (1914), 160 App. Div. N. Y. 110; 145 N. Y. Supp. 131, the court, in holding that there is no liability on the part of the condemnor of real estate for the removal of machinery said:

> "Claimants' property has been appropriated by the State for the purposes of the barge canal. The property consisted of land upon which was a building used as a bean and grain elevator. In the buildings were different machines used in the sorting and handling of the beans and grain, scales, belting, shafting, hangers, pickers, and other machinery. It has been found that all of the machinery in the factory building excepting the scales could be removed without material injury to the real estate. After the appropriation the claimant removed part of the more valuable machinery to a new factory built by him, for which he claims to have paid the contractor a nominal sum. The Board of Claims allowed to claimant the value of the land, also the cost of reproduction of the building, including the spouting and bins, but did not allow for this machinery which could have been removed from the building without injury thereto, which, however, was found to have been of the value of $4,303.20."

It was held that this item of damage was properly disallowed.

N. Y. Central R. R. Co. vs. *Pierce* (1885), 35 Hun. N. Y. 306.

N. Y. Central R. R. Co. vs. *Albany Steam Trap Co.* (1914), 146 N. Y. Supp. 674; 161 App. Div. 329.

In *Kansas City Southern Ry. Co.* vs. *Anderson* (1908), 88 Ark. 129, 133; 113 S. W. 1030, the court, in denying recovery for the cost of removing personal property from the premises condemned, said:

"V. Defendant introduced testimony as to the value of the stock of lumber and other personal property on the land sought to be condemned, and as to its depreciation in value and the cost of removing the same, over the objection of the plaintiff. At the conclusion of the testimony, the court decided to exclude all of this testimony, and did so, and told the jury that the sole question for their consideration was the value of the property sought to be condemned. The defendant excepted to this, and has cross-appealed upon this issue.

"There are some cases which sustain the appellee's position, and they may be found reviewed in *Blincoe* vs. *Choctaw, etc., Rd. Co.*, by the Oklahoma Territorial Supreme Court, 16 Okla. 286, s. c. 8 A. & E. Ann. Cases, 689, but it will be seen by reference to the editor's notes in the latter report that the majority of the courts hold that compensation cannot be recovered in such cases, either for damages resulting to personal property or for the cost of removing it from the premises. The controlling principle is thus stated by the New Hampshire court: 'As the title to all property is held subject to the implied condition that it must be surrendered whenever the public interest requires it, the inconvenience and expense incident to the surrender of the position are not elements to be considered in determining the damages to which the owner is entitled.' *Ranlet* vs. *Concord R. Corp.*, 62 N. H. 561.

"Mr. Lewis thus states the law upon this subject: 'Fixtures upon the property taken must be valued and paid for as part of the real estate, and any depreciation in the value

of the fixtures upon the part not taken is to be taken into consideration, the same as damage to the soil itself * * * But the damages to personal property, or the expenses of removing it from the premises, cannot be considered in estimating the compensation to be paid.' 2 Lewis on Eminent Domain (2d ed.), Sec. 488."

In *Springfield Southwestern R. Co.* vs. *Schweitzer* (1913), 173 Mo. App. 650; 158 S. W. 1058, the court said:

"The sole question before this court is whether a tenant with a lease three years yet to run has a right, when the property to which his lease attaches is taken on condemnation proceedings, to be reimbursed for the expense incurred in removing his personal property from the place taken, and whether he is entitled to recover for the damages sustained by said personal property in moving by breakage and deterioration.

"The majority of the courts hold that compensation cannot be recovered for the cost of removing personal property from the condemned premises. * * *

"As the Supreme court has ruled in no uncertain terms that the expense of removing personal property from condemned premises cannot be recovered by the owner of such personal property, it is our plain duty to follow that ruling."

Mo. Pac. Ry. Co. vs. *Porter* (1892), 112 Mo. 361; 20 S. W. 568.

In *C. P. R. Ry. Co.* vs. *Pearson* (1868), 35 Cal. 247, 263, the court said:

"The item of several hundred dollars allowed Pearson for the supposed cost of removing his personal property from the premises was improperly allowed by the Commissioners, and should have been stricken out by the Court below. In cases of this character the landowner is entitled only to *such damages, over and above the value of the land sought to be appropriated, as the statute gives.*"

The rule in connection with the allowance of damages for the cost of removing in Massachusetts is not entirely clear.

The language in some of the early cases, and the holding in the case of *Brooks* vs. *Boston* (1837), 19 Pick. 174, would seem to indicate that the Massachusetts court at one time would recognize such items of consequential damage. But in the case of *N. Y., N. H. & H. Ry. Co.* vs. *Blacker* (1901), 178 Mass. 386; 59 N. E. 1020, the court, considering these earlier decisions, flatly overrules the case of *Brooks* vs *Boston* and seems to establish the rule in Massachusetts that the cost of removing personal property, in the absence of a statute, is not an allowable element of damage. In the latter case the statute provided for the recovery of "all damages sustained by any person in his property." The damages excluded as consequential were the costs of removing the contents of a building cut off by the taking, and the waste in handling coal which had to be removed, and loss from necessary interruption to business. The court in part said:

> "The exceptions taken by the petitioners were not well taken. They excepted to the rulings that they were not entitled to recover (1) the cost of moving the contents of the building which was cut off by the taking, or (2) the damages which they sustained from waste in handling the coal which had to be moved, or (3) the damages caused by the necessary interruption of their business.
>
> * * * *Brooks* vs. *Boston* cannot now be regarded as authority (see *Rand* vs. *Boston*, 164 Mass. 354) and the later cases have established the rule that consequential damages are not within such statutes. In *Edmands* vs. *Boston*, 198 Mass. 535, it was held that the cost of moving away goods which were in a store when a portion of it was taken in widening a street, to a place of safety while the necessary repairs were being made, and the cost of bringing them back, could not be recovered; and that the lessee of the store could not recover damages for loss of good will of his business. See p. 549. And in *Williams* vs. *Commonwealth*, 168 Mass. 364, it was held that a life tenant who had been at certain expense in making the premises taken adapted to his business of a dentist, but which it was admitted did not increase the market value of the premises, could not recover for the damages so suffered by him, and on the ground that

they 'cannot be regarded as an element of damage, any more than the loss of good will would be.' The same general rule is recognized in *Maynard* vs. *Northampton,* 157 Mass. 218, 219, and in *Butchers' Slaughtering & Melting Association* vs. *Commonwealth,* 169 Mass. 103, 118, 119."

Emery vs. *Boston Terminal Co.* (1901), 178 Mass. 172; 59 N. E. 763.

In Pennsylvania the decision in the early case of *Philadelphia R. Co.* vs. *Getz* (1886), 6 Atl. 356, seems to have been abandoned by the Supreme Court of Pennsylvania in the case of *Becker* vs. *Philadelphia & R. T. R. Co.* (1896), 177 Pa. 252; 35 Atl. 617, and the general rule adopted. In the latter case the court held that the issue to determine the amount of damages to which an owner was entitled in consequence of the taking of his property by a railroad company, limited the inquiry to a determination of the value of the real estate, and did not permit the owner to offer evidence as to the difference in the value of a stock of merchandise in the store which was taken and what the stock would be worth to be removed to another place. The court held that the plaintiff had ample time in which to remove his goods, and that no damage in respect thereto could be claimed.

See also *Ranlet* vs. *Concord R. Co.* (1883), 62 N. H. 561.

North Coast R. Co. vs. *Kraft Co.* (1911), 63 Wash. 250; 115 Pac. 97.

Note in 4 L. R. A. (N. S.) 890.

Note in 8 American and English Ann. Cases 696.

An exhaustive examination of the authorities dealing with the question as to whether the cost of removal of personal property from land taken by condemnation is an element of allowable damages, discloses that there are only two states, viz., Oklahoma and Illinois, where, in the absence of a statute, such damages are allowed, and the courts in these two jurisdictions recognize that their holdings are not in

accord with the weight of authority or general rule. Two states, Massachusetts and Pennsylvania, seem to have once allowed such conjectoral elements of damages, but, recognizing the practical difficulties of applying such a rule, the courts in these two states, as already pointed out, seem to have abandoned the minority holding and accepted the doctrine generally adhered to.

Since the complainants would not be entitled to recover as damages the cost of removing machinery or other personal property from their premises, it was proper for the legislature in enlarging the owners' rights of recovery against the city of Providence to place such limitations upon that extension of the owners' rights as it saw fit.

C.

If There Were a Right Independent of Statute, to Recover the Reasonable Cost of Removing Machinery, Said Provision Provides for Such Reasonable Recovery.

Even if this court were to abandon the rule as recognized by the great weight of authority and hold that, independent of statute, a party should recover the reasonable cost of removing personal property from lands taken under eminent domain, still the provision of Section 12 of said Act provides for such a reasonable recovery.

Reasonable cost of removal would, of course, require some limitation upon the distance that the machinery could be moved at the expense of the city. Surely, it would not be necessary or reasonable to provide that the cost of removal to Europe or the Pacific Coast could be recovered. No sound rule of law would render the liability of the condemning municipality so dependent upon the caprice of the individual owner. One owner's cost of removal, in the absence of limitation, might be one dollar per machine, while another

owner, perceiving an opportunity to avail himself of free transportation, might incur a cost of fifty dollars per machine. It is obvious that under any rule of law in this regard the liability could not extend beyond a reasonable limitation.

What is a reasonable limitation for the removal of mill machinery situated as in this case? The Act has allowed the removal to be to any place within the New England States at the expense of the City. The New England States include many manufacturing centers, skilled workmen especially in the textile industries, large labor markets, convenient supplies and many other advantages for operating mills and producing fabrics, and especially such as are manufactured by the Joslin Manufacturing Company. It is difficult to conceive how the State could have made a more generous and unrestricted provision in favor of the mill owners, without being grossly unjust to the city of Providence. If the State of New York had been included within the area, another party might wish to transfer his machinery to New Jersey, another to Pennsylvania, another to Ohio, another to Illinois, and so on indefinitely. As to the reasonableness of this limitation, we are not concerned with whether one or more owners might prefer free transportation for their machinery to New York or to any other state. It is simply a question as to whether or not there are in the New England States sufficient opportunities for relocating the industries with transportation, markets, and other circumstances substantially like those at present enjoyed. Doubly fair and ample does this provision seem when it is recalled that by another provision of Section 12 of said Act the right is given to the owner of a mill taken to surrender to the city of Providence the machinery in use or set up in such mill. If any of the complainants were prejudiced by the restrictions complained of, they had ample opportunity to surrender their machinery and recover the fair value thereof.

ISSUE 8.

The Legislature Had Power to Grant the Franchise Under the Act Subject to the Conditions and the Requirements of Compensation for Consequential Damages.

The Act conferred upon the City of Providence an extremely valuable franchise, which applied to a large part of the lands included in the Town of Scituate, and seriously affected the owners thereof including the Town itself. Manufacturing communities were to be affected by the taking of the mills, and removals would be necessary to new homes, and work would have to be sought in other places, and for the most part outside the Town. Machinery not surrendered would have to be moved to new locations outside the Town. Various businesses would have to be discontinued or moved to new locations outside the Town, as the extent of the authorized taking would materially reduce the population of the Town. The town hall and other town buildings in Scituate were included in the area authorized to be taken. No town buildings in any other town were authorized to be taken.

The authority given was exercised by the taking of many properties devoted to many different uses, and independent of the condemnation of the location for the aqueduct, 12,450 acres of land, included within the main authorized condemnation area of 16,600 acres, were acquired by purchase or condemnation, and 20.97 acres more for the new highway system, and 17.73 acres more for burial grounds, having thereon 1,195 buildings including 6 cotton mills, other smaller mills, 20 stores and shops, 7 school houses and 3 or more other public buildings of the Town, 375 dwelling houses, 6 churches, numerous cemeteries, etc.

Therefore the diverse circumstances and various effects of such an unusual taking were properly cognizable by the legislature, and while exercising its public duty to provide for

said public water supply, it also had the public duty to prescribe such conditions and provide for such compensation as would be reasonable and equitable for uprooting such a community. To limit the compensation to accord with the rule found just and sufficient in the case of ordinary takings, at least would not have been actually, if legally, just and adequate in this unusual case. The Act introduced at the previous 1914 Session and passed in its final form at the 1915 Session contains the conditions and the provisions for consequential damages which are objected to by the plaintiffs in error, although the City Council of the City requested the passage of the Act in its final form and has accepted its provisions and has carried out the same to the present time without any party, except the plaintiffs in error, interposing any legal objection thereto.

POINT I.

The Provisions for Consequential Damages Do Not Conflict with the Judicial Power or Its Exercise.

The essence of the plaintiffs' objection is that the extension of the compensation to include consequential damages prescribes rules and principles, upon which compensation shall be computed, inconsistent with the judicial power and its exercise. This objection ignores the fact that such an extension does not diminish the rights of the condemnees guaranteed by the constitution or according to judicial rules, but enlarges them. The cases cited by the plaintiffs arose from attempts made to diminish rights guaranteed by the constitution or judicial rules, and therefore are not in point.

The authorities all agree that the legislature in authorizing a condemnation may provide for the payment of consequential damages.

2 *Nichols Em. Dom.* Sec. 348, p. 965, 966, 967.

"It is very often provided that the taking of land for the public use—shall be subject to a more extensive liability for compensation than the constitution requires, and that the owner shall be paid all sorts of consequential damages. Such provisions are open to no constitutional objections.—A municipal corporation cannot be compelled to pay money for private purposes, but it is universally held that payment of debts morally but not legally binding is a proper expenditure of public money, and under this principle statutes making an individual whole for any loss he has actually suffered by the exercise of eminent domain have been sustained."

Relative to changing the basic provision for damages after the taking—

"By virtue of the control of the state over its municipal corporations, a statute allowing compensation from a city or town for a species of injury which had not previously been actionable is not unconstitutional in its application to damages sustained prior to the enactment of the statute."

1 *Dillon* Sec. 379, p. 691.

Earle v. *Commonwealth* (1902), 180 Mass. 579, 582.

The act allowed damages to the business of a physician and it was claimed that this provision of the act was unconstitutional. The court by Holmes C. J. said:—

"The ground seems to be that taxes cannot be levied for purposes of this sort, except to pay for property taken or destroyed, and that the business of a doctor is not property within the principle—Very likely the plaintiff's rights were of a kind that might have been damaged if not destroyed without the constitutional necessity of compensation. But some latitude is allowed to the Legislature. It is not forbidden to be just in some cases where it is not required to be by letter of paramount law. We think it so plain that, as was assumed by everybody in *Sawyer* v. *Metropolitan Water Board*, 178 Mass. 267, the provision is constitutional, that we prefer to say so without stopping to consider whether the question is open."

And cited among others the following cases:—

United States v. *Realty Co.* 163 U. S. 427;

Guthrie National Bank v. *Guthrie*, 173 U. S. 528, 563-7;

New Orleans v. *Clark*, 95 U. S. 644;

Brackett v. *Commonwealth* (1915), 223 Mass. 119, 123.

"Doubtless the injuries sustained by the petitioners were of a kind for which at common law no action would lie and no constitutional right would have been infringed if no provision for compensation to them had been made—But the Commonwealth was not thereby precluded from awarding them damages. Statutory compensation is not imperatively confined to the boundaries of strict rights secured by the paramount law."

Matter of Borup (1905), 182 N. Y. 222, 226.

It was held that an act allowing damages for a change of grade of a street previously made was "in no sense a gift or gratuity of either the money or property of the town," the Court saying:—

"There is no provision of the Constitution that restricts the legislature from providing for the payment by a municipality of claims against it that are founded in equity and justice."

People ex rel. Burhans v. *City of New York* (1910), 198 N. Y. 439, 446.

The contention was made in behalf of the City of New York that Chapter 314 of the Laws of 1906 allowing business damages was in conflict with the state constitutional provision, "nor shall private property be taken for public use without just compensation" which, it was claimed, was a limitation and prohibition on the power of the legislature to require that more than just compensation be paid; and that the requirement imposed upon the city to pay such damages was not due process of law and denied the equal protection of the laws, secured by both the state and the federal constitutions.

The court held:—

"The right of eminent domain is an attribute of sovereignty which the state may grant or withhold at its will. When it delegates that right it may impose upon the donee any condition that does not encroach upon or abridge any of the constitutional rights of those whose property is to be taken. It may require the donee of the right to do more than is demanded by the Constitution, but it may not permit less to be done. If the donee accepts the right and exercises it, the conditions subject to which it is granted can not be evaded or ignored. They are part and parcel of the grant. The whole argument upon this question is aptly and tersely stated in the language of Chief Judge Cullen in *Matter of New York*, 190 N. Y. 350, 354, where he wrote, 'that as the right to exercise the power of eminent domain must proceed from legislative authority, the legislature may require more liberal compensation than that which would satisfy the constitutional requirement, but it cannot direct that anything less than just compensation shall be made.' That statement of the law cuts off at its root the contention of the appellants that the legislation under which the City of New York is extending its water supply is unconstitutional. The only criticism made upon these statutes is that they require the city to do more than is demanded by the Constitution, and the obvious answer to it is that the city has acquired from the state a privilege which was granted upon specified conditions, and these the city must be deemed to have accepted with the grant."

POINT II.

Said Act Does Not Unduly Discriminate and Violate the "Equal Protection of the Laws."

As to the alleged discrimination between the Town of Scituate and other Towns relative to the right of Scituate to surrender the furniture and building equipments in its public buildings taken, and the alleged discrimination between the owners of mills located in Scituate and the owners of mills located outside of Scituate, and the alleged discrimination between the owners of businesses located in

Scituate or on the north branch of the Pawtuxet river and the owners of other businesses elsewhere situated, it is sufficient to say that the bills of complaint do not contain any allegations relative to or raise any such questions, and that all mills of the complainants were taken, and in any event they having no interest could not raise any such questions. As matters of fact no public buildings belonging to any other town and no mills located in any other town were taken.

As to the further alleged discrimination as to limiting the payment for business damages to businesses established at the time of the passage of the Act, and as to limiting the payment to the cost of removing machinery to any location in New England, these have been fully considered under Issues 6 and 7 herein.

It is apparent to any extent the relevant provisions involved a classification, that the classification was reasonable, and that all persons properly within the scope of the class were included, and that there was no denial of the equal protection of the laws. As said in 2 *Nichols Em. Dom.* Sec. 345, p. 960, the application of this prohibition to the exercise of eminent domain is very limited.

POINT III.

The Plaintiffs' Claim, That the Extension of the Compensation to Include Consequential Damages is Confiscatory and Deprives Them of Their Property Without Due Process of Law, Cannot be Maintained.

The bills of complaint do not contain any allegations relative to or raise any such question. Further, as before seen the complainants as taxpayers have no standing to object to an exercise of legislative power and discretion imposing in granting a franchise to a municipal corporation reasonable conditions including compensation for consequential damages in order that actual damages may be paid for.

For All of the Aforegoing Reasons All of Said Constitutional Questions Should be Decided in Favor of the Constitutionality of Said Act and Such Provisions Thereof as Have Been Brought in Question Upon the Record.

Respectfully submitted,

ELMER S. CHACE,
ALBERT A. BAKER,

Attorneys for the Defendants in Error.

APPENDIX

PART ONE.

All Matters of Judgment Relative to the Necessity and Extent of a Taking Are for the Legislature to Determine and Not for the Courts, and This Public Power May Be Delegated to and Exercised by, a Municipality without Granting Hearings to Property Owners.

The rules of law to the above effect are stated and amplified by authorities and decisions as follows:—

4 McQuillin Municipal Corporations.

"Sec. 1458. The rule is well settled by a multitude of authorities that the power to exercise the right of eminent domain may be delegated to a municipality by the legislature, and hence the question is no longer open to discussion.

So the legislature may delegate the power to municipal officers to determine whether a municipality shall acquire the fee or only an easement in the land condemned. However, in delegating the power of eminent domain to a municipality, the legislature may impose conditions which require the municipality to do more than is exacted by the constitutional provisions in regard thereto, and if the municipality exercises the power so delegated it cannot evade or ignore the conditions.

"Sec. 1466. * * * And if the quantity is specified or a maximum prescribed by the legislature, no more can be taken, although in such cases the condemnor is under no obligation to take all that is permitted. On the other hand, it is held that more may be taken than is needed at the time, in anticipation of the increased demands of the future.

"Sec. 1495. * * * Likewise, a municipality cannot condemn lands outside its own corporate limits unless the power has been delegated by the legislature. However, it is well settled that the legislature may delegate such power."

Judge Dillon, in his work on *Municipal Corporations*, 5th ed., Vol. 3, Section 1023, says:

> "As the legislature is the sole judge of the public necessity which requires or renders expedient the exercise of the power of eminent domain without the owner's consent, so it is the exclusive judge of the amount of land and of the estate in land which the public end to be subserved requires shall be taken."

In *Lewis on Eminent Domain*, 3d ed., Vol. I, appears the following statement of the law:

> "Sec. 255. Some courts have held that, in order to uphold an exercise of the power of eminent domain, a necessity must exist for its exercise, in order to accomplish the purpose sought, and that this question of necessity is in some way an element in determining whether the taking is for public use. Thus it is argued that a hotel or theater is not a public use within the meaning of the constitution, because the public can be accommodated in those respects without resorting to the power of eminent domain. Nearly all the cases, however, hold that the question of necessity is distinct from the question of public use, and that the former question is exclusively for the legislature. The necessity, expediency or propriety of exercising the power of eminent domain, and the extent and manner of its exercise, are questions of general public policy and belong to the legislative department of the government. They have nothing to do with the question of what constitutes a public use.
>
> "Sec. 369. Whether the power of eminent domain shall be put in motion for any particular purpose, and whether the exigencies of the occasion and the public welfare require or justify its exercise, are questions which rest entirely with the legislature. 'When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance.'
>
> " 'The general principle is now well settled that when the uses are in fact public, the necessity or expediency of taking private property for such uses by the exercise of the power of eminent domain, the instrumentalities to be used and the extent to which such right shall be delegated are questions appertaining to the political and legislative branches of the government.'

"The question of necessity is sometimes confounded with that of public use, and it has sometimes been maintained that the exercise of the power of eminent domain must be founded on a public necessity. *But we know of no case in which it has been adjudicated that an appropriation of private property for a recognized public use, or an authority to make such appropriation, was void because, in the opinion of the court, there was no necessity for an exercise of the eminent domain power.*"

Judge Cooley, in his *Constitutional Limitations,* 7th ed., p. 77, approved of the above rule and further says, with respect to a work of improvement of local importance, that the legislature not only may, but generally does, refer the question of necessity, "which must be determined by a view of the facts which the people of the vicinity may be supposed best to know," to some local tribunal.

The clear and proper distinction between "public use" and "necessity" has been recognized by the Rhode Island court. In the case of *In re R. I. Suburban Ry. Co.* (1901), 22 R. I. 458, the court considered an act which gave to the R. I. Suburban Railway Company broad and general authority to condemn lands for its corporate purposes. The act provided that the court should determine whether the lands sought to be taken were necessary for its corporate purposes. The court held that—"The statute in this case, as we have construed it, calls for a finding of the necessity for a public purpose, because only such 'corporate purposes' as are in their nature public purposes can be considered to constitute a necessity within the meaning of the statute," and that the particular land sought to be condemned was not necessary for any public use. The court, however, recognized the general rule as to the power of the legislature to determine the question of necessity, and Chief Justice Stiness in the opinion of the court said:

"As we have already stated in this case, in regard to the constitutionality of the act, the legislature has no right to

condemn private property for any other than public purposes. *The legislature determines in what cases and to what extent the power of condemnation shall be exercised; but whether the use in a particular case is a public use is a question of law to be settled by the court.*"

In the case of *Richland School Tp.* v. *Overmeyer* (1905), 164 Ind. 382, 385; 73 N. E. 811, the court said:

> "The authority to determine in any case whether it is necessary or expedient to permit the exercise of the power of eminent domain, when not prohibited by the constitution, rests with the legislative department of the State; and the propriety of taking private property for public use is not a judicial question, but one of political sovereignty, *and a hearing upon the facts as to such propriety or necessity is not required.*"

The Massachusetts court has consistently recognized the distinction between "public use" and "necessity" and has recognized the principle that, in the absence of bad faith or gross abuse, the duty to determine the latter rests entirely with the legislature which may, and usually does, delegate the duty of determining the practical facts relative to the time, place and amount of the taking to some commission or body representing the public.

In the case of *Boston* v. *Talbot* (1910), 206 Mass. 82; 91 N. E. 1014, the court said:

> "But if the use for which the taking is made is public, the question whether the taking of a particular piece of real estate is necessary or expedient is a legislative question, upon which the decision of the Legislature, as a tribunal of fact, is conclusive. This doctrine covers the principle that the Legislature may determine what kind of an estate it is necessary to take to accomplish the public purpose for which the taking is made, and may take a fee, even though the use of the fee may not be permanent. e Legislature well might determine that a taking in fee mi be necessary in certain cases, in reference to a reasonabl economical management of the business in the public interest, even though the use

of the fee would not be needed permanently, and might authorize a subsequent sale or leasing of any rights in the property that were no longer devoted to the public use. We see no reason for doubting the constitutionality of the act.

"The right of the Legislature to determine what land, or rights or easements in land, it was necessary or expedient to take for use in the construction or maintenance of a tunnel and its appointments, *it could delegate to a tribunal representing the public interest in that particular.* The act of the Boston Transit commission, in the form of a taking in writing, duly recorded, in conformity with the statute, is to be treated as if it were a statute. Its exercise of delegated legislative authority and final judgment in determining what property it was expedient to take to accomplish the strictly public purpose for which the taking was made are not subject to revision. * * *

"So far as the facts offered in evidence tended to show that the commission was mistaken in its judgment as to what it was necessary and proper to take, they were incompetent, for upon that question its judgment was conclusive. None of the facts, if proved, would have controlled the official declaration of the commission that the taking was for the purposes set forth in the statute. They were not inconsistent with it. There was no error of law in the exclusion of the evidence."

In the case of *Lynch* v. *Forbes* (1894), 161 Mass. 302, the court said:

"The plaintiff contends, in both cases, that the taking was unlawful, and at the trial of the case in trespass he offered to show that, prior to the taking in question, the town had taken all the land that it needed, and that this was not suitable and was not necessary, useful, or proper for any of the purposes named in the acts under which it was taken. * * *

"There is no constitutional right on the part of the landowner in this State to have the question of the necessity or expediency of the taking in any particular instance, submitted to a court or jury. Holt 1. Somerville, 127 Mass. 408, 411. In the absence of any provision in the statutes submitting the matter to a court or jury, the decision of *the question lies with the body or individuals to whom the State has delegated the authority to take.* They have the same power as the State, acting through any regularly consti-

tuted authority, would have. Fall River Iron Works vs. Old Colony & Fall River Railroad, 5 Allen, 221, 226. People vs. Smith, 21 N. Y. 595, 597. Boom Co. vs. Patterson, 98 U. S. 403, 406. Stockton & Darlington Railway vs. Brown, 9 H. L. Cas. 246. Lewis vs. Western-Super-Mare Local Board, 40 Ch. D. 55. Cooley, Const. Lim. (5th ed.) 538. See Lewis, Eminent Domain, Sec. 238, note, for collection of cases. Of course neither the State nor its delegates can take under the guise of eminent domain the property of A. for the purpose of conveying it to B, or for a purpose clearly in excess of or at variance with the powers granted. No question of good faith, however, arises here, and the purpose for which the land was taken is within the scope of the acts authorizing it."

Talbot vs. *Hudson* (1860), Mass. 16 Gray, 417.

Burnett v. *Boston* (1899), 173 Mass. 173, 176.

"The statute leaves the determination of what it is necessary to take to the city, acting by its water board. So long as the members of this board act regularly and in good faith, their decision upon the question of necessity is final."

The courts of the State of Connecticut have recognized the same rule.

In the case of *Board of Water Com'rs.* v. *Manchester* (1915), Conn. 96 Atl. 182, 185, the court said:

* * * "The necessity for such a preliminary identification of the land to be taken arises in those cases in which the Legislature has delegated to the condemnor the power to select the particular property which is to be taken for a public use, as where it authorizes the building of a railroad between terminal points leaving the right of way to be located by the condemnor. In such cases the condemnor is vested, primarily at least, with the power to determine what land is necessary to be taken, and this determination is conclusive unless and until it is successfully attacked for unreasonableness, bad faith, or abuse of power."

In the case of *Board of Water Com'rs.* v. *Johnson* (1912), 86 Conn. 151; 84 Atl. 727, the court has assembled and con-

sidered a large number of general authorities upon this question. The court in part said:

> *"But the respondents urge that they have never had the opportunity to be heard upon the question of necessity, and that for that reason there has not been due process of law. They were not entitled to such opportunity.* It is well settled that, as related to the exercise of the power of eminent domain, all questions which are political in their nature and lie within the legislative province may be determined without notice to the owner of the property affected, and the question of whether a particular work or improvement shall be made, or particular property taken, being one of that character, that the owner is not entitled to a hearing upon it as a matter of right. Lewis on Eminent Domain, Sec. 567; Cooley's Constitutional Limitations, p. 538; Zimmerman vs. Canfield, 42 Ohio St. 463, 471; Appleton vs. Newton, 178 Mass. 276, 281, 59 N. E. 648; People vs. Adirondack R. Co. 160 N. Y. 225, 236, 54 N. E. 689; State Water Supply Com. vs. Curtis, 192 N. Y. 319, 330, 85 N. E. 148."

N. Y., N. H. & H. R. R. Co. vs. *Long* (1897), 69 Conn. 424; 37 Atl. 1070.

The rule as established by the Court of Appeals in New York is clearly set forth in the case of *Matter of City of New York* (*Ely Avenue*) (1916), 217 N. Y. 45. In this case the court said:

> "In view of the conflict of opinion between the decisions cited and the courts below in the case at bar, we deem it important for future guidance to finally determine the question in this case.
>
> "That the state, in its sovereign capacity, is vested with the power of eminent domain, *and the legislative department of the government may determine when the power may be exercised and delegate such power to a municipality is elementary.* * * *
>
> "It is the established law by numerous decisions of this court that in the exercise of the power of eminent domain the opinion of the legislature or the tribunal upon which is conferred power to determine the questions of necessity or expediency in the acquirement of private property for public

use is political, not judicial, in its nature. (People vs. Smith, 21 N. Y. 595; Matter of Townsend, 39 N. Y. 171; Matter of Fowler, 53 N. Y. 60; Matter of Union Ferry Company, 98 N. Y. 139; City of Buffalo vs. Pratt, 131 N. Y. 293; Matter of City of New York, 190 N. Y. 350-357.) In the Matter of City of New York, Chief Judge Cullen succinctly stated the rule as follows: 'It is the settled law of this state *that the character and quantity of the estate in lands to be acquired for public use rests wholly in the determination of the legislature.*' * * *

"This court has recently held that the courts will not impute to the legislature or the discretionary action of municipal bodies clothed with legislative powers other than public motives for their acts; that the presumption that legislative action has been devised and adopted on adequate information and under the influence of correct motives will be applied to the discretionary action of municipal bodies and will preclude all collateral attack (McCake vs. City of New York, 213 N. Y. 468), and this rule has long been established by decisions of this court."

The same rule is laid down by the Supreme Court of Maine.

In the case of *Rumford & Mexico Bridge Dist.* v. *Mexico Bridge Co.* (1916), 115 Me. 154; 98 Atl. 625, the court said:

"That the act is constitutional we entertain no doubt. Whether the public exigency requires the taking of private property for public uses is a legislative question, the determination of which by the Legislature is final and conclusive. Whether the use for which such taking is authorized as a public use is a judicial question for the determination of the court."

And in *Hayford* v. *Municipal Officers of Bangor* (1907), 102 Me. 340; 66 At. 731, appears the following:

"The Constitution of Maine (article 1, sec. 21) provides that 'private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it.' Under this section, three propositions arise with respect to the taking of private property by the right of eminent domain: First, whether the public exigency or

necessity requires it; second, whether the taking is for a public use; third, that just compensation must be made. The matter of compensation is not here raised. *The first, so far as we are aware, is held to involve a legislative question, and is not open to judicial revision.* The second is a judicial question, and may be reviewed by the court. Neither is this question raised in these proceedings.

"In the case at bar, the plaintiff's first claim is 'that the whole premises are not necessary for a library lot.' The issue here raised by the plaintiff is clearly a subject for legislative action. Such action has been taken and promulgated in Rev. St. Sec. 89, c. 4, above quoted. The Legislature has not undertaken to say, by its action, that any specific piece of land may be taken, but has declared that the public exigency, requiring that some private property may be taken for a public library building, exists, and thus the exigency or necessity is established by the enactment of the statute authorizing the taking."

The same rule is laid down in Kansas. In *Irrigation Co.* v. *Klein* (1901), 63 Kan. 484. The law in this connection is stated as follows:

"It is a basic principle of our form of government that no person can be deprived of life, liberty or property, except by due process of law. It is equally fundamental that the legislature possesses no power to take the property of anyone and give it to another for the advancement of simply private objects. To argue these propositions or state authorities in their support would be but a pedantic display of learning. It is equally well settled that the legislature may authorize the taking of private property by private persons or corporations for public uses, the owner of such property being compensated therefor. Courts determine what is a public use; legislatures, when the power of eminent domain may be exercised in its promotion. Courts may not interfere to limit or control the discretion of the lawmaking power as to the character, quality, method or extent of the exercise of the power of eminent domain by a private person or corporation engaged in the promotion of a public use, when once it has been determined that such use is a public one."

Sloan v. *Lawrence County* (1918), 134 Ark. 121, 128, 129; 203 S. W. 260, 261.

In this case, which involved the taking of lands for roads, the Court said:—

"In Cooley on Constitutional Limitations (7th Ed.) p. 777, and in Elliott on Roads and Streets (3rd Ed.) Vol. I, Sec. 224, the rule is unqualifiedly stated to be that the power of eminent domain is an inherent power of a sovereign state, and may be exercised as a political power without notice to interested landowners. * * The correct rule is, we think, laid down in Cooley on Limitations as follows:—

'The authority to determine in any case whether it is needful to permit the exercise of this power must rest with the state itself; and the question is always one of strictly political character, not requiring any hearing upon the facts or any judicial determination. * * * But parties interested have no constitutional right to be heard upon the question, unless the state Constitution clearly and expressly recognizes and provides for it. On general principles, the final decision rests with the legislative department of the State; and if the question is referred to any tribunal for trial, the reference and the opportunity for being heard are matters of favor and not of right. The state is not under any obligation to make provision for a judicial contest upon the question.'

"Our decisions commit us in a measure to that rule, for it has been decided in many of our cases that a statute giving public utility corporations the right of condemnation does not contemplate a trial of the issue of the right to condemn, and that those statutes are valid. It was held that the right to raise an issue concerning the necessity and propriety of the condemnation could only be raised in a court of equity on a charge of fraudulent attempt to condemn private property for private use under the guise of a public use. *Merneyee & Darragle* v. *Little Rock Junction Ry.*, 143 Ark. 120; * * *

"The cases on this subject are collated in a note (page 64) to the case of *Henderson* v. *Lexington*, 22 L.R.A. (N.S.) 22, and there appears a clear preponderence of the weight of authority in favor of the rule that necessity for condemna-

tion for strictly public use is a political question to be exercised by the lawmakers, and that a hearing upon the question of necessity is not essential to the validity of the proceedings."

The following cases in other jurisdictions recognize and endorse as well settled the holdings of the above authorities:

Bond v. *M. & C. C. of Baltimore et al.* (1911), 116 Md. 683; 82 Atl. 978.

State v. *District Court* (1916), Minn. 158 N. W. 240.

Pittsburgh F. T. W. & C. R. Co. v. *Sanitary District* (1905), 218 Ill. 286; 75 N. E. 892.

Henderson v. *City of Lexington* (1909), 132 Ky. 390; 22 L. R. A. (N. S.) 20.

Pittsburg Hydro Electric Co. v. *Liston* (1911), 70 W. Va. 83; 73 S. E. 86.

State v. *Steward* (1889), 74 Wis. 620; 6 L. R. A. 394.

For a further collection of authorities upon this point, see the exhaustive note, 22 L. R. A. (N. S.) 1, 64. Also the note 58 L. R. A. 240, on the subject "Acquisition of Water Supply by Right of Eminent Domain."

Although the principles laid down by the above authorities can not be said to be unanimously accepted, they represent the doctrine of the leading American and English jurisdictions as well as practically the universal expression of text writers on the subject.

It is true that a different conclusion may appear to have been reached in the case of *Stearns* v. *City of Barre* (1901), Vt. 50 Atl. 1086, but a careful reading of this case discloses that the court seems to rest its decision not upon accepted principle or general authority, but upon an interpretation of the special wording of the Constitution of Vermont. In the last few lines of the decision the court says: "It is the constitutional provision which represents the sovereign will, not the legislative or judicial." And a special rule seems to

have been laid down by the Supreme Court of North Dakota, as evidenced by the case of *City of Grafton* v. *St. Paul M. & M. R. Co.* (1907), 16, N. D. 313; 113 N. W. 598. In this case the court attempts to make a distinction between the necessity for the public improvement and what property is necessary to be taken for the improvement. In other words, the doctrine of this court would allow the legislature to determine the abstract fact that there was a necessity for a certain street, while the judiciary would assume the role of determining what should be taken for that street. It is submitted that the North Dakota court attempts to make a distinction which rests neither on principle nor common sense. What shall be the extent of a taking, whether immediate demands only shall be met, or whether by a more extensive development future conditions shall be anticipated, and the innumerable other considerations that determine the extent of a taking are even more political or legislative questions than the bare abstract proposition as to whether a street should be established or whether a water supply should be provided for a city.

These last two cases are here referred to, first, for the purpose of showing such dissent as there is from the general authority as to what body shall determine the questions of expediency and necessity and, second, to illustrate the practical difficulties into which we are led by any departure from the generally accepted doctrine.

Authorities Cited by the Plaintiffs in Error Relative to the Necessity and Extent of the Taking, and Comments Thereon.

McGehee on Due Process of Law, p. 296-7.

> "With regard to these questions action by the legislature, unless wholly arbitrary and unreasonable is in itself due process of law, and, where the legislature chooses to act, the owner of property condemned cannot complain of the want of a hearing on these matters. But the legislature may choose to delegate the decision of some of these ques-

tions to *tribunals*, and when the matter is so delegated it becomes judicial and due process of law is not satisfied but by notice and a hearing."

The word, "tribunals", as here used by Professor McGehee evidently means judicial tribunals, as without citing authorities he simply refers back to page 273 et seq. which recognizes the legislative power to delegate to an agency the taking of property within limits set by the legislature.

Tracy v. *Elizabethtown etc.* R. R. Co., 80 Ky. 259, 265.

Reed, etc. v. *Louisville Bridge Company,* 8 Bush (Ky.) 69, 72.

These cases were overruled by *Henderson* v. *City of Lexington* (1909), 132 Ky. 405, where the court said:—

"It is also argued that the question of the necessity for the taking should be left to the decision of a judicial tribunal. But all authorities agree that the question of necessity is distinct from the question of public use, and that the former question is exclusively for the legislature."

The court inquired into what was authorized by the act to be done.

Tedeus et al. v. *Sanitary District,* 149 Ill. 87.

This case was overruled by *Pittsburg etc. R. R. Co.* v. *Sanitary District,* 218, Ill. 286, where it was held that the question of necessity was a purely legislative matter, although the claim was made that the taking was very excessive.

Railroad Company v. *Blake,* 9 Rich. (So. Car.) 228.

This case simply interpreted the meaning of the railroad charter.

B. & O. R. R. Co. v. *The P. W. & Ky. R. R. Co.,* 17 W. Va. 812.

Overruled in *Hydro Electric Co.* v. *Liston,* 70 W. Va. 83, where the taking was by a corporation foreign to the state, the court saying:—

> "It is insisted in the brief of counsel for the plaintiff in error that no general necessity is shown to exist for exercising the eminent domain for the purposes in question. This is not a judicial question but a legislative one. In undertaking to pass upon this question is where a few of the courts of the country have fallen down."

The court ignored the decision in 17 W. Va.

Bennett v. *City of Marion,* 106 Iowa 628.

What the court actually decided was that the court had the right to inquire into an abuse of the power that was delegated.

Olmsted v. *Proprietors of Morris Aqueduct,* 46 N. J. L. 495.

Kountze v. *Morris Aqueduct,* 58 N. J. L. 303.

In these cases the act authorized any aqueduct company to take such lands and such waters as might be necessary for the corporate purposes of the company. The delegated authority here was construed to be limited by a question of fact as to what was necessary.

Spring Valley Water Works v. *San Mateo Water Works et al.,* 64 Cal. 123.

Decided under the Code of 1876, Vol. 2, Title 7, which expressly vests in the court the power to regulate and review the necessity of a taking.

Lynch v. *Sewer Commrs.,* 55 L. J. Ch. N. S. 409; L. R. 32 Ch. Div. 72, 559.

Errington v. *Metropolitan District R. Co.,* 51 L. J. Ch. N. S. 305; L. R. 19 Ch. Div. 559.

These cases only held that a taking by commissioners would not be upheld if there were no grounds on which any

reasonable person could come to the conclusion that the land taken was required.

The quotation from 2 *Nichols on Eminent Domain* 992 is taken out of a section dealing with special constitutional provisions, but the remainder of the paragraph not included in the quotation does not support the plaintiffs' contention.

Hunter v. *The Mayor and Aldermen of Newport,* 5 R. I. 325.
Hazard v. *Middleton,* 12 R. I. 227.

These cases were under an old highway act which provided for an appeal on the lay-out as well as on the damages.

In re R. I. Suburban Railway Company, 22 R. I. 455.

The act left the question of necessity expressly to the court.

PART TWO.

The Provisions of Section 23 of Said Act Provide for Due Compensation for Property Taken, and Do Not Violate Said Fourteenth Amendment.

Further authorities as to Issue 2 of the Brief, showing that the relevant decisions of the United States Supreme Court accord with the decisions of the leading jurisdictions of the States, are set forth as follows:—

The leading case in Massachusetts dealing with the question, when compensation must be made to the owner of private property taken by a municipality under eminent domain, is *Haverhill Bridge Props.* v. *County Commissioners of Essex* (1869), 103 Mass. 120, 124. This case is generally cited by text writers and courts as representing the present law in Massachusetts to the effect that a municipality may appropriate outright private property for public use without making payment in advance of the appropriation or af-

fording security other than the public good faith, if there be pointed out a process or means by which the owner's rights may be enforced against the municipality without unreasonable delay. The case is decided under a general constitutional restriction which is set forth in the comments on *Sweet* v. *Rechel* (*supra*). Justice Colt, speaking for the Massachusetts court, said:

> "The duty of paying an adequate compensation, for private property taken, is inseparable from the exercise of the right of eminent domain. The act granting the power must provide for compensation, and a ready means of ascertaining the amount. Payment need not precede the seizure; but the means for securing indemnity must be such that the owner will be put to no risk or unreasonable delay."

See *Briggs* v. *Cape Cod Ship Canal Co.* (1884), 137 Mass. 71.

In New York the rule is the same. The Constitution of New York contains the usual general restriction, Article I, Section 6, "nor shall private property be taken for public use without just compensation."

The case apparently most generally referred to as representing the law in the jurisdiction of New York State is *Matter of Mayor, etc., of New York* (1885), 99 N. Y. 569; 2 N. E. 642. In this case Finch, J., speaking for the Court of Appeals, said:

> "It is further objected to the act, that it makes no provision for just compensation to those whose lands are taken, and so violates section 6 of article 1 of the Constitution. While it is not necessary, in advance of the taking, to pay to the land owner his compensation, it is necessary that the act which invades his ownership shall provide for a certain and definite and adequate source and manner of payment. Sage v. City of Brooklyn, 89 N. Y. 189. This necessity is vital and of the most essential character, since if unheeded or disregarded, it transforms the right of eminent domain into a legalized plunder of the citizen. But this act does

not so offend. It puts the public purse of the city behind the debt as the source of its payment. By section 4 the municipality is required within four calendar months after the confirmation of the report of the commissioners, to pay the compensation awarded to the parties interested, and if payment be not so made, those to whom it is due may, after demand, maintain an action against the city. Nothing in this record shows that the municipality has already reached the limits of its capacity to contract debt, or cannot legally incur the new liability. There is no ambiguity or uncertainty about this provision, and the citizen is not turned over to the blind remedy of uncertain and complicated assessments, and a devious and doubtful litigation. It is true that the act contains provisions to enable the city to meet the liability imposed, which have been the subject of criticism in the arguments addressed to us. By section 10 the city is authorized to issue thirty-year bonds, drawing interest at a rate not exceeding three per cent, to be sold at not less than par, and the proceeds of which shall constitute the 'New Park Fund.' That does not alter or affect the right of the landowner. He has still the responsibility of the city which he may enforce in the courts, and has no concern with the question of the source of the debtor's payment. We cannot say that the provision is inadequate even for the purposes of the municipality, *but whether so or not, the security of the creditor remains in the corporate liability, which we have always held sufficient.*"

Another New York case, which is directly in point, is *Connolly* v. *Van Wyck* (1901), 72 N. Y. Supp. 382. The laws of 1899, C. 652, Sec. 2, gave the East River Bridge Commission power, with the approval of the Board of Estimate and Apportionment, to acquire certain real estate by condemnation, and provided that title to the property condemned be vested in the city, and that the buildings thereon could be sold before compensation to the property owner was made. The court said:

"He claims that the act, in so far as this is permitted to be done, is unconstitutional, because without due process of law his property is taken without just compensation being awarded him, in violation of the constitution of the United States and of the state.

"The courts of this state have decided that such a provision is not in violation of our constitution. Mr. Justice Patterson, in re Mayor, etc., of city of New York, 72 N. Y. Supp. 378, in a well considered opinion held it to be the settled law of this state that a provision of statute law authorizing the taking of private property by the state *or one of its municipalities*, under the right of eminent domain, without providing for payment prior to or concurrently with the taking, is constitutional if a sure, sufficient, and convenient remedy is provided by which the owner can subsequently coerce payment by legal proceedings; and the cases of Sage v. City of Brooklyn, 89 N. Y. 195, and in re Mayor, etc., of New York, 99 N. Y. 577, 2 N. E. 642, are cited with approval."

In re Elm Street (1895), 72 N. Y. Supp. 378.

State Water Supply Com. v. *Curtis* (1908), 192 N. Y. 319; 85 N. E. 148.

In re Walton Ave. (1909), 131 App. Div. 696; 116 N. Y. Supp. 471.

In re Newton Ave. (1916), 173 App. Div. N. Y. 15.

In Pennsylvania, Article I, Section 10, of the Constitution adopted in 1874, provides "nor shall private property be taken or applied to public use, without authority of law, and without just compensation being first made or secured."

Subject to this provision of the constitution, the case of *Lewisburg Bridge Co.* vs. *Union County et al.* (1911), 232 Pa. 255; 81 Atl. 324, was decided. The court said:

"But the plaintiff contends that the act in question is unconstitutional and void, and that, since the Constitution gives a right to damages for property taken, injured, or destroyed, the present action could be maintained under the rule that, 'when a right exists and no adequate remedy is provided, it may be enforced by an action on the case.' Chester County v. Brower, 117 Pa. 647, 656, 12 Atl. 577, 578 (2 Am. St. Rep. 713). We cannot agree that the act should be set aside as unconstitutional legislation. The fact that there is no express provision in the statute for paying or securing the damages before the taking or injury cannot be urged as a valid basic objection. In Keene v. Bristol

Borough, 26 Pa. 46, 47, dealing with this subject, we said: *'Ordinarily the power of taxation which is given to municipal corporations is adequate security to the citizen for his property which may be taken* * * * for public use.' In McClinton v. Railway Company, 66 Pa. 404, it is pointed out that, while private corporations invested with the right of eminent domain must pay or secure payment before the taking or injury, *this strict rule does not apply to the state or to municipal corporations;* as to them, it is only necessary to provide the means of payment in the act of assembly authorizing the improvement. And in Delaware Co.'s Appeal, 119 Pa. 159, 171, 13 Atl. 62, 65, we said: 'It has been repeatedly held that the power of taxation in a municipal corporation is sufficient security for property taken by such corporation; thence it logically follows that it is sufficient for property injured.'"

In New Hampshire the rule seems to be the same. The Constitution of New Hampshire, Part First, Article 12, provides:

"But no part of a man's property shall be taken from him or applied to public uses without his own consent or that of the representative body of the people. Nor are the inhabitants of this state controllable by any other laws than those to which they or their representative body have given their consent."

In deciding the case of *Orr* vs. *Quimby* (1874), 54 N. H. 590, 593, the court stated the law as follows:

"It was also contended, on behalf of the plaintiff, that the statute, if held not to require the assessment and payment or tender to precede the taking, is unconstitutional, because it does not so require nor provide for a fixed and definite fund to secure the payment of the sum which may be assessed. * * *

"In Ash v. Cummings, 50 N. H. 591, this subject was carefully considered, and the decision was that when an individual or a private corporation is authorized by law to take private property for public uses, it is indispensable that the law should not only provide for an assessment of the damages, but should secure the appropriation of a definite

and certain fund out of which such damages shall be paid; but, in the opinion of the court (p. 621) Judge Sargent states, that 'in cases where the state or a county or a town is to be made liable for the damages which an individual may suffer by having his property taken for the public use, it is not so important that the compensation should be paid or secured in advance, provided the law provides a certain and expeditious way of ascertaining and recovering it, because there the presumption and the fact are that these municipalities are always responsible.' "

The law as recognized by the New Jersey courts is substantially the same.

The Constitution of New Jersey, Article I, Section 16, provides:

> "Private property shall not be taken for public use, without just compensation; but land may be taken for public highways as heretofore, until the legislature shall direct compensation to be made."

In deciding the case of *Loweree* vs. *City of Newark* (1875), 38 N. J. 151, 154, the court stated the New Jersey law as follows:

> "But it is not necessary that compensation should precede the actual appropriation, where the property is taken by the state, or by a municipal corporation by state authority. It is sufficient that an adequate remedy is provided, which the party may resort to on his own motion to recover compensation. Cooley in Const. Lim. 560. The difference in the language of paragraph 18, Article I, and of paragraph 9, Section 7, Article IV, of the Constitution of 1846, (Par. 16, Art I, and par 8, sec. 7, Art IV, of the amended constitution of 1875), marks the distinction, in this respect, between a taking by a public municipal corporation and by an individual or private corporation. It is only where the right of eminent domain is exercised in favor of an individual or a private corporation, that compensation must precede the taking."

The Nebraska court has interpreted the general constitu-

tional restriction of that state relative to taking private property for public use, in the same way.

The Constitution of Nebraska, Article I, Sec. 21, provides:

> "The property of no person shall be taken or damaged for public use without just compensation therefor."

In deciding the case of *State* vs. *Several Parcels of Land* (1907), 79 Neb. 638, 648, the court said:

> "It is generally recognized as the rule that, when property is appropriated by a municipality, there is a general liability against the municipality for payment for the lands appropriated. It is generally recognized that where the taxable property of the municipality is all liable for taxation to make payment for the property appropriated, the rule requiring a safe and adequate fund is complied with." (Cites Sweet v. Rechel, 159 U. S. 380.)

The following cases recognized that, in so far as a general constitutional restriction is concerned, a state or a municipal subdivision thereof may appropriate private property for public use, without making or securing compensation in advance, if there be provided the owner a means of having his damages determined by an impartial tribunal and the award enforced without unreasonable delay.

State v. *Messinger* (1880), 27 Minn. 119; 6 N. W. 457.

Steenerson v. *Fontaine* (1908), 106 Minn. 225; 119 N. W 400.

Barton v. *Edwards* (1915), 120 Ark. 239; 179 S. W. 354.

Dromberger et al. v. *Reed* (1859), 11 Ind. 420.

See *In re City of Cedar Rapids* (1892), 85 Ia. 39; 51 N. W. 1142.

The above authorities represent the leading American jurisdictions where the constitutional restrictions relative to the taking of private property for public use are general in character.

Authorities Cited by the Plaintiffs in Error Relative to the Plaintiffs' Claim That Compensation Must Precede the Possession and Use of the Lands Taken, and Comments Thereon.

Kennedy v. *Indianapolis*, 103 U. S. 599, 604.

This case involved the Constitution of Indiana, which had been interpreted by the Supreme Court of that state, and therefore this court followed the State Court decision. The whole project has been abandoned and no compensation paid. *Sweet* v. *Rechel*, 159 U. S. 380 discriminated the Kennedy case and held that it did not controvert the general rule.

Levee Commrs. v. *Dancy*, 65 Miss. 335, 341.

A special constitutional provision controlled.

Livingston v. *Commrs.* of Johnson County, 42 Neb. 277, 281, and other Nebraska cases.

Discriminated in *State* v. *Several Parcels of Land* (1907), 79 Neb. 638, 648, where the court held that in takings by cities of the metropolitan class the liability of the city is sufficient security to comply with the constitutional requirement.

Askam v. *King County*, 9 Wash. 1

and other Washington cases.

The constitutional provision required payment to precede the taking, but Section 16 of Article I expressly exempted municipal corporations from the requirement.

Powers v. *Bears*, 12 Wis. 213.

and other Wisconsin cases, where the condemnors were railroads or other quasi-public corporations.

Jane v. *Racine* (1913), 155 Wis. 1, 18.

held that a municipality may first take and pay afterwards.

Caldwell v. *Highway Commrs.* 249, Ill. 366,

There was no express provision requiring prepayment, and this jurisdiction furnishes an exception to the general rule. In this case the payment was to be out of a tax to be levied, and there was no right to enforce payment by execution. This case, however, seems to recognize that the State itself might take without prepayment, but could not delegate such power.

Southern New England Railway Co. v. *Shuttleworth,* 38 R. I. 216.

The question was as to the time from which interest ran, and it was held to be from the time the Railroad Company was entitled to possession.

PART THREE.

The Fundamental Provisions of Said Act Are in Accord with Established Legislative Practice and Such Practice is Entitled to Great Weight in Deciding Any Question as to Their Constitutional Validity.

POINT I.

The Fundamental Provisions of Said Act Are in Accord with the Established Legislative Practice in Rhode Island.

An examination of Rhode Island legislation relative to eminent domain proceedings, where the taking has been by the state or a municipal sub-division thereof, shows that the fundamental provisions of the Act in question are in entire accord with the established legislative practice in Rhode Island. This legislation includes the following acts:

Act Relative to Such Public Taking for a Pest House.

"An ACT impowering the Freeman of the Town of Providence to take up a convenient Piece of Land for the Building a Pest-House." (1752), R. I. Acts and Resolves, February, 1752, p. 65.

Acts Relative to Such Public Taking for Highways, Driftways and Streets.

An Act in Relation to the Laying Out, Enlarging, Straightening or Otherwise Altering Streets in the City of Providence. (1854), R. I. Acts and Resolves, January, 1854, p. 251.

An Act in Relation to Laying Out and Altering Streets in the Towns of North Providence, Cranston, Woonsocket and Pawtucket. (1870), R. I. Acts and Resolves, January, 1870, Chap. 872, p. 143.

An Act in Addition to Chapter 59 of the General Statutes, "Of Laying Out and Making Highways and Driftways." (1877), R. I. Acts and Resolves, January, 1877, Chap. 619, p. 148.

Acts Authorizing the City of Newport to Condemn Certain Lands for Highway Purposes. (1896), R. I. Acts and Resolves, January, 1896, Chaps. 377, 378, pp. 88, 91.

An Act to Provide for the Construction, Improvement and Maintenance of State Roads. (1902), R. I. Acts and Resolves, January, 1902, Chap. 982, p. 54.

Act Relative to Such Public Taking for Straightening a River Boundary.

An Act to Establish the Boundary Line Between the City of Providence and Town of North Providence Along a Portion of the Woonasquatucket River; and to Provide for the Straightening of Said River and Line. (1861), R. I. Acts and Resolves, January, 1861, Chap. 362, p. 122.

Acts Relative to Such Public Taking for Water.

An Act for Supplying the City of Providence with Pure Water. (1866), R. I. Acts and Resolves, January, 1866, Chap. 640, p. 254.

An Act for Supplying the State Farm with Pure Water. (1870), R. I. Acts and Resolves, May, 1870, Chap. 877, p. 3.

An Act for Supplying the Town of Pawtucket with Pure Water. (1875), R. I. Acts and Resolves, May, 1875, Chap. 491, p. 5.

An Act in amendment of an act, entitled, "An act for supplying the Town of Pawtucket with pure water." (1876), R. I. Acts and Resolves, January, 1876, Chap. 529, p. 147.

An Act in amendment of an act, entitled, "An act in amendment of an act entitled 'an act for supplying the Town of Pawtucket with pure water,' being Chap. 529 of the Public Laws." (1882), R. I. Acts and Resolves, January, 1882, Chap. 293, p. 168.

An Act in addition to Chap. 491 of the Public Laws, passed June 3, 1875, entitled, "An act for supplying the Town of Pawtucket with pure water." (1884), R. I. Acts and Resolves, January, 1884, Chap. 439, p. 182.

An Act for supplying the Town of Cumberland with pure water. (1893), R. I. Acts and Resolves, January, 1893, Chap. 1254, p. 361.

An Act to increase the efficiency of the Woonsocket Water Works. (1904), R. I. Acts and Resolves, January, 1904, Chap. 1181, p. 62.

Acts Relative to Such Public Taking for Parks.

An Act to authorize the City of Providence to establish a public park in said city. (1869), R. I. Acts and Resolves, January, 1869, Chap. 813, p. 139.

An Act to repeal chapters 813 and 817 of the Public Laws and to authorize the city council of the City of Providence to lay out and establish a public park. (1872), R. I. Acts and Resolves, January, 1872, p. 193.

An Act in addition to an act entitled "An Act enabling the City of Woonsocket to build a city hall and to establish public parks," passed at the January session, A. D. 1890. R. I. Acts and Resolves, January, 1890, Chap. 892, p. 261.

An Act authorizing the City of Woonsocket to build a city hall and to lay out and establish one or more public parks in said city, etc. (1890), R. I. Acts and Resolves, May, 1890, Chap. 917, p. 29.

An Act granting the City of Providence the power to condemn the "Hopkins Burial Ground" for park purposes. (1891), R. I. Acts and Resolves, January, 1891, Chap. 946, p. 186.

An Act authorizing the City of Providence to condemn a certain piece of land on Governor Street between Williams and Thayer Streets for park purposes. (1891), R. I. Acts and Resolves, May, 1891, Chap. 998, p. 25.

An Act to condemn land adjoining Roger Williams Park for park purposes. (1891), R. I. Acts and Resolves, July, 1891, Chap. 1018, p. 206.

An Act authorizing the Park Commission of the City of Newport to procure a site and to build a city hall and for certain other purposes. (1894), R. I. Acts and Resolves, May, 1894, Chap. 1344, p. 33.

An Act authorizing the City of Providence to condemn certain lots of land for park purposes. (1895), R. I. Acts and Resolves, January, 1895, Chap. 1409, p. 94.

An Act to condemn certain land by the State for metropolitan park purposes. (1910), R. I. Acts and Resolves, January, 1910, Chap. 569, p. 89.

An Act authorizing the City of Providence to condemn for public park purposes certain parcels of land adjoining Tockwotton Park in said city. (1912), R. I. Acts and Resolves, January, 1912, Chap. 867, p. 300.

An Act authorizing the City of Providence to condemn for certain public purposes certain parcels of land in said city. (1914), R. I. Acts and Resolves, January, 1914, Chap. 1120, p. 194.

An Act to condemn certain land by the State for metropolitan park purposes. (1915), R. I. Acts and Resolves, January, 1915, Chap. 1248, p. 152.

An Act creating the Corliss Park and authorizing the condemnation of certain land in connection therewith. (1915), R. I. Acts and Resolves, January, 1915, Chap. 249, p. 171.

An Act creating the West River Parkway and authorizing the condemnation of certain lands in connection therewith. (1915), R. I. Acts and Resolves, January, 1915, Chap. 1250, p. 175.

An Act authorizing the City of Providence to condemn for public park and playground purposes certain parcels of land in said city. (1915), R. I. Acts and Resolves, January, 1915, Chap. 1279, p. 332.

An Act creating the Metropolitan Marine Park and authorizing the condemnation of certain lands in connection therewith. (1916), R. I. Acts and Resolves, January, 1916, Chap. 1372, p. 129.

An Act to condemn certain land by the State for Metropolitan Park purposes. (1917), R. I. Acts and Resolves, January, 1917, Chap. 1518, p. 117.

An Act authorizing the City of Newport to purchase or condemn for public park purposes a certain parcel of land

in said city. (1917), R. I. Acts and Resolves, January, 1917, Chap. 158, p. 268.

Acts Relative to Such Public Taking for Public Buildings.

An Act to provide a new court house for the County of Providence. (1875), R. I. Acts and Resolves, January, 1875. Chap. 445, p. 169.

An Act to authorize the City of Pawtucket to condemn land and buildings and to erect a city hall, etc. (1890), R. I. Acts and Resolves, January, 1890, Chap. 887, p. 247.

An Act in addition to an act entitled, "An Act Enabling the City of Woonsocket to Build a City Hall, etc." (1890), R. I. Acts and Resolves, January, 1890, Chap. 892, p. 261.

An Act authorizing the City of Woonsocket to build a city hall, etc. (1890), R. I. Acts and Resolves, May, 1890, Chap. 917, p. 29.

An Act to provide for the creation of a Board of State House Commissioners, etc. (1893), R. I. Acts and Resolves, January, 1893, Chap. 1201, p. 272.

An Act in amendment of and in addition to Chapter 1201 of the Public Laws. (1894), R. I. Acts and Resolves, May, 1894, Chap. 1322, p. 9.

An Act authorizing the City of Providence to take certain land in the City of Providence and to convey the same to the United States of America for a site of a public post office. (1902), R. I. Acts and Resolves, January, 1902, Chap. 1015, p. 95.

An Act authorizing the City of Newport to condemn certain lands for the purpose of erecting thereon a police station. (1913), R. I. Acts and Resolves, January, 1913, Chap. 1005, p. 171.

Act Relative to Such Public Taking for Terminal Railroad Facilities.

An Act enabling the City of Providence to condemn certain lands for public purposes. (1884), R. I. Acts and Resolves, January, 1884, Chap. 422, p. 163.

Acts Relative to Such Public Taking for Bridges.

An Act to provide for the construction and maintenance of a new bridge upon the site of "Red Bridge" so-called. (1894), R. I. Acts and Resolves, May, 1894, Chap. 1332, p. 18.

An Act for the appointment of a Commission for the erection of a bridge between the cities of Pawtucket and Central Falls. (1909), R. I. Acts and Resolves, January, 1909, Chap. 499, p. 389.

Acts Relative to Such Public Taking for Sewerage.

An Act in Amendment of Chapter 474 of the Public Laws, Passed March 27, 1885, Entitled, "An Act to Establish the City of Pawtucket." (1890), R. I. Acts and Resolves, January, 1890, Chap. 878, p. 249.

An Act Authorizing the City of Woonsocket to Acquire Land for the purpose of Establishing a System of Sewerage in Said City, etc. (1891), R. I. Acts and Resolves, May, 1891, Chap. 1003, p. 30.

An Act Establishing a First Drainage District in the Town of Westerly and Providing for the Construction, Installation and Maintenance of a System of Public Drains or Sewers in said District. (1916), R. I. Acts and Resolves, January, 1916, Chap. 1449, p. 275.

Acts Relative to Such Public Taking for School House Sites.

An Act to provide for the taking of land for school pur-

poses in the City of Providence. (1895), R. I. Acts and Resolves, January, 1895, Chap. 1402, p. 83.

An Act to provide for the taking of land for school purposes in the City of Newport. (1896), R. I. Acts and Resolves, January, 1896, Chap. 380, p. 105.

An Act enabling towns to condemn lands for school purposes. (1906), R. I. Acts and Resolves, January, 1906, Chap. 1306, p. 19.

Act Relative to Such Public Taking of Shore Property.

An Act to Authorize the Appointment of and to Define the Powers and Duties of a State Harbor Improvement Commission for the Acquirement and Improvement by the State of Shore Property in Providence, Pawtucket and East Providence. (1910), R. I. Acts and Resolves, January, 1910, Chap. 568, p. 75.

It is important to note how completely the Rhode Island legislative practice, as established by the aforegoing fifty acts involving public takings for so many different purposes, including water supply purposes, is in entire accord with the fundamental provisions of the Act in question. As appears in this volume of legislation, except in a few cases, the legislature delegated the determination of the necessity and extent of the taking to some agency such as a city or town council, board, commission or committee. The town or city council was repeatedly authorized to make such determination or to appoint a committee to make the same, and such practice covers many years.

Moreover, in these acts the discretion given by the legislature to the town or city councils or other agents relative to the determination of the necessity and extent of the taking was frequently extremely broad, and very much broader than that given in the Act in question. Most of the acts relative to taking lands for parks, certain public buildings, and

harbor and terminal facilities specified the lands which might be taken, but in all the other cases involving over half of the specified legislation, the determination was left to the broad discretion of the agency. Such was the case in the pest house act of 1752, and many other later acts. Note particularly that such was the case in the first act, that of 1866, for providing the City of Providence with a supply of pure water, and in all the subsequent water acts, except the Act in question where the authority was limited.

Relative to the time of the taking and the vesting of the title to the lands taken, it is to be noted that in every one of these fifty acts the taking and vesting of title occurred, as in the Act in question, prior to the determination or payment of the compensation. This appears from the express language in very many of the acts. In the others it appears to be the necessary effect from particular provisions of the acts. The pest house act of 1752 affords an early example of such a prior taking of title, in providing that

> "if they (the committee of the Town of Providence appointed to select the site) cannot agree with such Owner, then they are to value the Land according to the true Worth thereof, and give Notice to the Town-Treasurer of said Providence, of their Doings, who shall thereupon, in the Presence of the said Committee, or two other lawful Witnesses, tender the Price thereof, in Money, to such Owner or Owners; and upon such Tender, the Freemen of the said Town of Providence shall become seized in Fee-simple of the same, always reserving to such Owner or Owners, the Right of demanding and receiving of the Town of Providence, the Price of said Land estimated as abovesaid, when he shall think fit to ask for the same;"

and further giving the owner an appeal and right to a jury trial on the question of damages subsequent to the vesting of the title.

The Providence road act of 1854, later in 1870 and 1877 applied to other towns and cities of Rhode Island, and the

Providence park acts of 1869 and 1872 provided that, after the city or town had decided that it required certain land for highway or park purposes, and the commissioners appointed by the Supreme Court on application of such city or town had reported to the Court relative to damages, the city or town upon its election to proceed with the improvement, *"shall become seized of all the lands, tenements, hereditaments, and premises, in said report mentioned,"* and provided that the owners of property so taken could subsequently prosecute appeals and have a jury trial on the question of damages. Still another form commonly used was that appearing in the original Providence water act of 1866, and later in the state farm water act of 1870, the Pawtucket water acts of 1876 and 1882, and the Woonsocket water act of 1904, which authorized the taking of the necessary lands and provided, as in the Providence water act of 1866, that

> "If any owner of lands, waters or water rights taken for the purposes of this act, shall not agree with said city upon the price to be paid therefor, he may at any time within, but not after, one year, from the time of such taking, apply by petition to the Supreme Court holden within and for the county in which such lands, waters or water rights *shall have been taken* (for the appointment of commissioners to award damages, and gave an appeal therefrom and a right to a jury trial as to the amount of damages), *provided, that no petition or complaint shall be made as aforesaid, for the taking of any land, water or water rights, until the same shall be actually taken or withdrawn by said city, by virtue of the provisions of this act.*"

And still another form is that similar to the provision used in the Act in question and which was commonly used in the many takings for parks, schools, public buildings and harbor facilities, as in the Pawtucket city hall act, which provided that

> "The city council of said city shall, * * * file in the office of the recorder of deeds of said city a description of said land as above set forth, and a statement that the same is taken pursuant to the provisions of this act, which descrip-

> tion and statement shall be signed by the mayor of said city, and upon the filing of such description and statement the title in fee simple of said land shall vest in the said city of Pawtucket."

and left the land owner to collect his damages in the absence of agreement by means of a subsequent jury trial.

A number of these acts have expressly provided upon the taking for immediate possession and use by the condemnor of the properties taken prior to compensation being made, and have specifically directed the removal of buildings from, and other physical alterations to be made in, the property taken. The provisions of the Providence road act of 1854, which also appear in the acts of 1870 and 1877, making its provisions applicable to other towns and cities, as well as the Providence park acts of 1869 and 1872, specifically provided that, after the filing of the commissioners' or appraisers' report on the amount of damages and upon the city's or town's election to take, and before the damages had been finally determined, the title shall forthwith vest in the city, and that the city could take immediate possession and remove buildings, &c., an example of the latter provision appearing in said 1854 act as follows:

> "And said city of Providence may thereupon, by such persons as the Board of Aldermen of said city shall order, either immediately or at any time or times thereafter, take possession of the same, or any part or parts thereof, without any suit or proceeding at law for that purpose, and remove all buildings and other impediments as said Board of Aldermen shall direct."

The amending state house act of 1894 enlarging the powers of the board of state house commissioners provided that it could,

> "in such manner as it may elect, sell and dispose of any buildings, fences, or other appurtenances to the real estate acquired by it in the name of the State of Rhode Island as a site for a state house (which under the original act

could occur prior to the payment of compensation) or may rent any of said buildings or real estate, until such time as it shall become necessary to remove said buildings, * * * Said board may, if it deems it advisable, purchase land in the name of the State of Rhode Island, and remove thereto any of the buildings which shall be upon the land acquired by it for a site for a state house and may thereafter dispose of such land and buildings at public or private sale."

Relative to the authorization given the city under the Act in question to sell water to other municipalities, it is noted that such was the authority under the Providence water act of 1866 and the Pawtucket water acts of 1875 and 1884. The Providence act of 1866 provided that said city "may regulate the distribution and use of said water within and without the city; and from time to time to fix the price for the use thereof."

The Pawtucket act of 1875 provides that:

"The town of Pawtucket is authorized, in the manner hereinafter provided, to * * * receive water from the City of Providence upon such terms as may be agreed upon by the city council of said city and the town council of said town for the purpose of furnishing a supply of pure water for said town:"

And the Pawtucket water act of 1884 provides that:

"The Town of Pawtucket is authorized to use the water of Abbott's Run taken by said town * * * to supply the town of East Providence, or any part thereof, the town of Lincoln or any part thereof, and the town of Cumberland, or any part thereof, under any acts now in force authorizing said town of Pawtucket to supply water to the inhabitants of said towns or any of them, or which may hereafter be enacted by the general assembly for that purpose;"

Nowhere in Rhode Island legislation has an act been found which allowed business damages, until the Act in question.

Most of the acts, as the Act in question, provide upon the final determination of the amount of the damages that execution shall issue therefor.

POINT II.

The Fundamental Provisions of Said Act Are Also in Accord with the Established Legislative Practice in Other States.

This appears from numerous cases cited under the Issues in the main Brief.

A complete examination of Massachusetts legislation relative to eminent domain proceedings, where the taking has been by the state or a municipal sub-division thereof, shows that the fundamental provisions of the Act in question are in accord with the established legislative practice in Massachusetts. This is true as to all the many subjects of state, city or town takings, and innumerable instances have been found where such was the case relative to takings for water supply purposes.

Commencing as early as 1843 and continuing down to the present time, there has been an almost unbroken series of acts for supplying a large number of Massachusetts cities and towns with water, the provisions of which have established a consistent scheme of legislation, the fundamental provisions of which are in entire agreement with the fundamental provisions of the Act in question. In all of these many water supply acts and almost invariably so in the other acts the legislature left without restriction the decision as to the necessity of the taking and the extent of the taking to the discretion of the cities or towns.

These many acts, in almost every instance, required that a description of the land taken be filed in the land recorder's office or elsewhere, and a very large number of them provided that upon such filing the title forthwith vested in the state, city or town. While in instances involving takings by private corporations, it was stipulated that damages be paid before entry, in all of the many cases of takings by cities and towns for water supply purposes and almost invariably in case of the takings for other purposes, provision was made

for the determination and recovery of damages subsequent to the taking and the passing of the title. Indeed many of the water supply acts go further and, as did the West Bridgewater Act (Mass. Acts and Resolves, 1893, Chap. 240), provide that:

> "No application for assessment of damages shall be made for the taking of any water, water right, or any injury thereto, until the water is actually withdrawn or diverted by said town under the authority of this Act."

These Massachusetts acts in other respects are in complete accord with provisions of the Act in question. Some of them expressly authorized the removal of buildings and other physical changes to be made in the property prior to the determination of the compensation. The tunnel and subway act of 1907 (Mass. Acts and Resolves, 1907, Chap. 573) did so and provided that:

> "The commission may sell the buildings and other structures upon any lands taken by it, or may remove the same, and shall sell, if a sale be practicable, or if not shall lease, any lands, or rights or interests in land or other property so taken or purchased for the purposes of this act, whenever the same shall in the opinion of the commission cease to be needed for such purposes."

A number of these acts provided for the sale of water by one town or city to another, as in the Watertown act of 1875 (Mass. Acts and Resolves, 1875, Chap. 199), where Watertown was authorized to supply Belmont.

The acts commonly provided, in the event of disagreement as to damages following the taking by a city or town, for a subsequent jury trial, and upon the entry of judgment for execution to issue.

For instances of large takings for water supply purposes involving a comprehensive plan, see the legislation relative to water supplies for the Metropolitan Water District in Massachusetts (Boston and certain of its environs) and for the City of New York.

Massachusetts Acts and Resolves, 1895, Chap. 488, and the many subsequent related acts.
New York Laws of 1905, Chaps. 724, 725.
New York Laws of 1906, Chap. 314.
New York Laws of 1909, Chap. 350,
and other legislation relating thereto.

In both of these plans the legislature, practically without restriction, left to a commission the determination of both the necessity and the extent of the taking for water supply purposes, and both plans provided for the filing of a description of the property taken either at the time of, or preliminary to, the taking. In this connection note that the Massachusetts Act, in Section 5 of the Act of 1895, provided that

> "Said board, to take any property by right of eminent domain, shall sign and cause to be recorded in the registry of deeds for the county and district in which the property to be taken is situated, a statement containing a description thereof, as certain as is required in a common conveyance of land, and stating that the same is taken for the metropolitan water works; and upon such recording the ponds, works, lands, waters, easements, rights and other property described in said description shall be taken by the Commonwealth;"

and that the New York Act after providing for the filing of maps and plans of the property required, and the subscribing and filing of an oath by the commissioners, further provided in Section 11 of said Chapter 724 that

> "On filing the said oath, in the manner provided in the previous section, the city of New York shall be and become seized in fee of all those parcels of real estate which are on the maps in the fifth section referred to described as parcels, of which it has been determined that the fee should be required; and may immediately or at any time or times thereafter take possession of the same or any part or parts thereof without any suit or proceeding at law for that purpose."

In both plans it was provided that the taking was to occur and the title vest in the state or city prior to the determination of the compensation to the property owners who were left to recover the same in subsequent proceedings.

Note that the Massachusetts Act of 1895, Sec. 14, in providing for certain business damages, gave the right to recover the same to

> "any individual or firm owning on the first day of April in the year eighteen hundred and ninety-five an established business on land in the town of West Boylston."

Said date was prior to the date of the passage of the act which was on June 5, 1905, while in the Act in question the recovery of business damages was limited to business existing on the date of the passage of the Act. The right in the Massachusetts act to recover damages to business existing on April 1, 1895, was subsequently extended by later acts to include such businesses on lands in certain further towns or districts.

The New York plan provided, in the Act of 1905, Chap. 724, Sec. 40, and in the Act of 1909, Chap. 350, Sec. 1, for supplying water to other towns and cities than New York, and the Massachusetts plan, in the Act of 1895, Chap. 488, Sec. 3, provided for supplying water to any city, town or water company outside the Metropolitan Water District on such payment of money as the board may determine.

Both these plans provided that, in case of disagreement as to the damages, the property owners had a right of action.

POINT III.

Such Well Established Legislative Practice is Entitled to Great Weight in Deciding Any Questions as to the Constitutional Validity of Any of the Provisions of Said Act.

That the legislative practice is entitled to great weight in deciding any question as to the constitutional validity of an act is well established by the authorities:

Endlich on the Interpretation of Statutes, Secs. 357, 358, and the cases and authorities therein referred to.

Black on Interpretation of Laws, p. 41.

Lewis' Sutherland, Statutory Construction, 2nd Ed., Vol. 2, p. 888.

Black on *Interpretation of Laws*, p. 41, *supra*, says:

"By the practical construction of the constitution is meant the construction put upon it by the legislative body, which is charged with the making of laws in accordance with the constitution, or by the officers of the executive department, whose function is to put into execution the constitution and the laws. Where there has been a practical construction, which has been acquiesced in for a considerable period, considerations in favor of adhering to this construction sometimes present themselves to the courts with a plausibility and force which is not easy to resist. Indeed, where a particular construction has been generally accepted as correct, and especially when this has occurred contemporaneously with the adoption of the constitution, and by those who had opportunity to understand the intention of the instrument, it is not to be denied that a strong presumption exists that the construction rightly interprets the intention."

PART FOUR.

Opinion of the Supreme Court of Rhode Island Holding, Among Other Things, That Said Act Does Not Violate Said Fourteenth Amendment.

SUPREME COURT OF RHODE ISLAND.

JOSLIN MANUFACTURING CO.
vs.
WALTER L. CLARKE, CITY TREASURER, ET AL. } C. Q. No. 484.

THERESA B. JOSLIN
vs.
WALTER L. CLARKE, CITY TREASURER, ET AL. } C. Q. No. 485.

SCITUATE LIGHT & POWER CO.
vs.
WALTER L. CLARKE, CITY TREASURER, ET AL. } C. Q. No. 486.

OPINION.

STEARNS, J. These are three bills in equity brought in the Superior Court by the Joslin Mfg. Co., The Scituate Light & Power Co., both Rhode Island corporations, and Theresa B. Joslin, a resident of Scituate and the owner of the majority of the stock of both of these corporations.

The Joslin Mfg. Co. owns and operates a number of mills in Providence and in Scituate in which are manufactured cotton yarn and boot and shoe lacings. This company is also a taxpayer in the city of Providence. The Scituate Light & Power Co. owns and controls certain water powers and privileges and real estate in Scituate and is engaged in the business of furnishing electricity for light, heat and power. Theresa B. Joslin is an owner of real estate and a taxpayer in Scituate and the city of Providence. The respondents are the City Treasurer of Providence and the individual members of the Water Supply Board of said city.

The bill in each of these causes alleges that certain provisions of Chapter 1278 of the Public Laws which is entitled "An Act to Furnish the City of Providence with a Supply of Pure Water" are in conflict with the provisions of Article XIV of the Amendments to the Constitution of the United States and the provisions of Section 5 and Section 10 of Article I of the Constitution of Rhode Island, and is brought to enjoin the respondents, their agents and servants from taking possession of, or interfering with, the complainants' property under color of condemnation proceedings.

The respondents called to the attention of the Superior Court the fact that the constitutionality of an act of the General Assembly had been brought in question upon the record by the allegations of each of said bills, and the constitutional questions thus raised were certified, under Chapter 298, Section 1, of the General Laws of 1909, to this court for the determination of said constitutional questions.

The principal questions involved in each of these causes are the same and by agreement of the parties they were argued and are to be considered together.

By the provisions of the act in question a Board of Commissioners, to be known as the Water Supply Board of the City of Providence, was appointed and established. This board was directed to determine whether a part of the north branch of the Pawtuxet river and the water shed tributary thereto would be the most available and desirable source for a supply of pure and wholesome water for the city of Providence and for any territories now supplied or hereafter supplied under the provisions of this act by means of the water works of said city, and if that source is approved said board is directed to make a plan locating a storage reservoir and an aqueduct therefrom to the city water works.

After making such a plan the board is authorized to purchase for the city any such land, water rights, *etc.*, after the city council has made due provision for supplying the necessary funds to pay therefor.

By Sec. 5 the City of Providence is authorized to acquire by condemnation any lands and any interests in any lands "which are included within the area enclosed by the boundary line colored red on the accompanying plat marked 'Plat of lands enclosed by red lines hereon, mostly in the town of Scituate, which may be taken by the City of Providence for water supply purposes, Samuel M. Gray civil engineer, 1915', a plat of part of said line at North Scituate being also shown on the accompanying supplementary plat, entitled 'Map showing location of condemnation line at and near North Scituate, Samuel M. Gray, civil engineer, 1915', and which the city council of said city deems necessary for the location, construction, maintenance and operation of a reservoir or reservoirs, and any dams, sluices, culverts, water and landways, and works connected therewith or incidental thereto" and also any lands and interests in any lands within

said area which said city council deems necessary for protecting the water in said reservoirs, river branch and its tributaries from pollution.

By Sec. 6 like power of condemnation of the waters above mentioned included in the designated area, and also of any water or flowage rights appurtenant to said area is granted to the city council.

The act also provides that whenever the city council shall pass any resolution to condemn any property under the act, it sha'l cause to be filed with the town or city clerk of each town or city in which any such property lies, a statement containing a description of the property taken, and that upon the filing of such statement, or plat in certain cases provided for, the title of the property condemned shall vest in the city of Providence in fee simple, unless a less estate is specified in said statement. After the filing of the statement the city may take possession of the property, provided, however, that it shall not take actual possession without the consent of the owner until after the expiration of one year from the date of the filing of the statement or plat.

If the owner of the property shall agree with the city upon its price, the same shall be paid to him forthwith by the city. In case of a failure to agree, the owner may, within one year after personal notice of the taking, or if he have no personal notice within two years from the date of the filing of the statement or plat, apply by petition to the Superior Court and have an assessment of damages by him sustained, determined by a jury, with the right to apply for a new trial for cause. Upon the entry of judgment execution shall be issued against the city therefor. Instead of claiming a jury trial for the assessment of damages, any owner may petition the Superior Court for the assessment of damages by a commissioner to be appointed by the court, the expense of such commission to be paid by the city.

The city is authorized when it takes actual possession of

property, either by purchase or condemnation, to dispose of and cause to be removed any buildings or improvements thereon which would obstruct the work or should be removed to accomplish the purposes of the act.

The city is also authorized and empowered from time to time to hire and use all sums of money necessary to secure such water supply either by purchase or condemnation, and to issue its bonds and notes therefor and provision is made for the establishment of a sinking fund for the redemption of such obligations.

The right to condemn under the act is limited to the period of two years from the date of the passage of the act.

Pursuant to the provisions of the act, said water board prepared a description of the lands, *etc.*, proposed to be taken, and a plat thereof and submitted the same to the city council for action upon the proposal. The city council by resolution approved December 4, 1916, did elect to take and alleged that it took the certain lands, *etc.*, therein described, and wherein were specified the nature and extent of the title and the purpose for which the same were taken. The said taking with certain exceptions, not here material, was in fee simple and included therein was certain property of the complainants. No question is now raised in regard to the regularity of the formal action by which the condemnation was effected.

The complainants contend that said water supply act is unconstitutional and void in that it violates the provisions of Section 1 of the 14th Amendment to the Constitution of the United States and the provisions of Section 5 and Section 10 of Article I of the Constitution of Rhode Island in that under its provisions the complainants are deprived of their property without due process of law for the reason that their property is allowed to be taken under color of eminent domain by the city of Providence acting under said act, when the questions of the necessity of the taking as a whole

or the taking of the various parcels which are taken have not been decided by the legislature itself, but have been relegated to the city of Providence to decide *ex parte* without appeal and without an opportunity to have said questions heard and decided by an impartial tribunal; also because the act permits the city of Providence to take possession of complainants' property and dispose of the same without offering any compensation therefor or having any value thereof determined before said taking; that it permits the taxpayers of the city of Providence to be burdened by a large and unnecessary expenditure which is not wholly for the benefit of said city but in part for the benefit of other municipalities or companies outside of said city which do not contribute to any portion of the expenditure for said water supply.

Section 10 of Article I provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury; to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining them in his favor, to have the assistance of counsel in his defence, and shall be at liberty to speak for himself; nor shall he be deprived of life, liberty, or property, unless by the judgment of his peers, or of the law of the land."

Section 10 has no bearing on the questions raised as it is settled that this section applies only to persons accused of crime. *East Shore Land Co.* vs. *Peckham,* 33 R. I. 541, and cases cited therein.

Neither do we think that Section 5 of Article I of the Constitution of Rhode Island has any application to the questions in the case at bar.

Section 5 provides that, "Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right

and justice freely and without purchase, completely and without denial; promptly and without delay; conformably to the laws."

In *Perce* vs. *Hallett*, 13 R. I. 364, this court held that a statute which prescribed entry and continuance fees for suits at law and in equity did not violate the provisions of Sec. 5, Article I. In speaking of this section Durfee, C. J., says: "The provision has a history which sheds light on its meaning. It was borrowed from Magna Charta. * * * In the light of both history and legislative practice, therefore, we think the legitimate conclusion is, that the declaration of the Constitution was intended to prohibit, not fees, like those prescribed in the fee table, but gratuitees, or exactions, given or demanded for the direct purpose of influencing the course of legal proceedings."

Mr. Barrington in his treatise on Magna Charta speaking of the original clause in Magna Charta says that it relates to the jury system and at p. 344 says: "The custom of bringing presents to the king and paying him for the adjudication of cases undetermined before that court was one of the reasons that led to the insertion of the 40th chapter. By it the king was prevented from taking either money or presents for the granting of justice by his courts."

This court has passed upon Sec. 5 in the following cases: *Littlefield* vs. *Peckham*, 1 R. I. 500; *Hudson* vs. *Geary*, 4 R. I. 485; *In Re Joseph B. Nichols*, 8 R. I. 50; *Conley* vs. *Woonsocket*, 11 R. I. 147; *Spalding* vs. *Bainbridge*, 12 R. I. 244; *Perce* vs. *Hallett*, 13 R. I. 363; *Henry* vs. *Cherry & Webb*, 30 R. I. 13.

The cases referred to are mostly cases in which protection was sought under the provisions of Sec. 5 from statutes requiring litigants to pay certain fees in jury trials and on appeal and to furnish surety for the costs of suit. In view of the origin and history of Sec. 5 and its construction and

application as above indicated it is clear that this section has no bearing on the questions in regard to condemnation raised by the complainants in these cases.

Section 16 of Article I, Constitution of Rhode Island, is as follows: "Private property shall not be taken for public uses without just compensation." This is the specific provision in our constitution in regard to the subject of condemnation and there are a number of decisions of this court defining the rights of the parties under this section, in condemnation proceedings. As this section has heretofore been considered the safeguard in our state constitution of property rights in condemnation proceedings, it is significant that no claim is made by the complainants that the water supply act violates in any respect the inhibitions of this section, either in regard to the necessity or the extent of the taking, or the provisions for compensation. That the taking in this case is for a public use is admitted by the complainants.

We come now to the consideration of the contentions of the complainants that the act violates the 14th Amendment and particular objection is taken to the methods provided in the act for determining the necessity and extent of the taking authorized thereby.

In the recent case in the Supreme Court of the United States (March 4, 1918) of *John H. Sears Appt.* vs. *The City of Akron* (not yet published in the U. S. Reports), the facts as reported are as follows: The city of Akron is situated on the Little Cuyahoga river a short distance above its confluence with the Big Cuyahoga. In May, 1911, the legislature of Ohio granted to the city by special act "the right to divert and use from" for the purposes of its water supply "The Tuscarawas river, the Big Cuyahoga and Little Cuyahoga rivers and the tributaries thereto, now wholly or partly owned or controlled by the state." Subsequently the city by resolution of its council declared its intention to appro-

priate all the waters above a point fixed of the Cuyahoga river and its tributaries and thereafter by an ordinance it appropriated the same, directed its solicitor to apply to the courts to assess the compensation to be paid, and provided for the payment of "the costs and expenses of said appropriation" out of an issue of bonds theretofore authorized. The city then constructed a dam and reservoir at the place specified and announced its intention of diverting the water before or by August 1, 1915. On July 24, 1915, John H. Sears, a citizen of New York, who had a legal interest in the property in question, filed suit in the District Court of the United States, northern district of Ohio, praying that the further construction of the dam and reservoir and the diversion of the water of the river be enjoined. The complainant claimed that the act in question was contrary to and in violation of Sec. 10 of Art. I of the Constitution of the United States and of the 14th Amendment thereto, in that it authorized a taking of private property by a municipality without any determination of the necessity for such taking other than the determination of the council of such municipality, which determination is made without any hearing and without the owners of such property having any opportunity to be heard; that the defendant was now proceeding, under color of authority of said Statute, to take private property upon its own determination of the necessity for such taking when no such necessity in fact existed, and that the owner of the property rights involved was being deprived of its property without due process of law; that other sources of supply were available to the defendant for purposes of municipal supply and were adapted to that purpose and sufficient, if properly developed, to furnish an abundant supply of water for the municipality and its inhabitants for many years to come; that the defendant was without funds and was financially unable to pay the damages caused to the owner, and that the defendant had not made any provision for raising or obtaining the money necessary to pay

such damages and compensation. The defendant moved to dismiss the bill in the trial court because the bill stated no cause for equitable relief and because it did not appear therein that the defendant had committed or threatened to commit any unlawful act which had resulted or would result in injury to the plaintiff. Certain other causes for dismissal were set forth which are not material in the case at bar. The case was dismissed in the District Court which held that the allegations with respect to the insolvency of the city of Akron, although technically admitted by the motion to dismiss, as a matter of fact were untrue and that the city was solvent and able to pay its obligations. The bill was dismissed in the District Court and on appeal to the Supreme Court the action of the lower court was affirmed. In the opinion, which was delivered by Mr. Justice Brandeis, the court says: "*Fourth*: Plaintiff contends that the ordinance is void because the general statute which authorized the appropriation violates both Article I, Section 10, of the Federal Constitution and the Fourteenth Amendment, in that it authorizes the municipality to determine the necessity for the taking of private property without the owners having an opportunity to be heard as to such necessity; that in fact no necessity existed for any taking which would interfere with the company's project; since the city might have taken water from the Little Cuyahoga or the Tuscarawas rivers; and furthermore that it has taken ten times as much water as it can legitimately use. It is well settled that while the question whether the purpose of a taking is a public one is judicial; *Hairston* v. *Danville & Western Railway*, 208 U. S. 598; the necessity and the proper extent of a taking is a legislative question." The court cites the following cases in support of this proposition: *Shoemaker* v. *United States*, 147 U. S. 282, 298; *United States* v. *Gettysburg Electric Ry. Co.*, 160 U. S. 668, 685; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 65.

There is a striking similarity in many respects between

the *Sears* case, *supra,* and the cases at bar and the decision of the Supreme Court, *supra,* gives a conclusive answer to the principal contentions of the complainants. In regard to the provision for compensation it is to be noted that the complainants in this case have additional security to that which was given under the Ohio act, in that provision is made under the Rhode Island act that an execution for an award or upon a verdict for damages shall run against the city.

In *East Shore Land Co.* vs. *Peckham, supra,* this court held that a similar provision for compensation in condemnation proceedings was not in violation of the state constitution; that when the power of eminent domain is exercised for the benefit of the state or a municipal corporation, if a remedy is provided against the state or municipality which is adequate and certain it is not essential that payment should first be made before the taking by condemnation.

The complainants, the Joslin Co. and Theresa B. Joslin, as taxpayers in the city of Providence question various provisions of the act and particularly Sec. 18 by which certain municipalities and water and fire districts which are located in the drainage district, are given the right to take and receive certain limited amounts of water on certain terms and conditions specified in the act. The provision thus made by the legislature for the communities whose source of water supply is taken away, in whole or in part, is reasonable and just, and if the city of Providence desires to secure the advantages of the act it is clear that the legislature has the power to impose reasonable conditions upon the city. These provisions are severable from the remainder of the act and their validity can be determined later if questioned by any one whose rights are affected thereby. The provisions of Section 18 are permissive in their nature and not obligatory upon the municipalities who are entitled to receive the water. It is probable that in the future some, if not all of these rights will be exercised by the different communities, but the complainants, however, at the present time, before

even the dam and reservoir are completed, have no such interest in the provisions in question as will enable them to test the constitutionality of these provisions. In *City of Newport* vs. *Horton*, 22 R. I. 196, this court affirmed the principle as stated in *State* vs. *Snow*, 3 R. I. 64, that no one can take advantage of the unconstitutionality of an act who has no interest in and is not affected by it. The application of this principle disposes likewise of the objections to the provisions of the act in regard to special compensation for the cost of moving machinery, *etc.*

The act in question considered as a whole shows an intention on the part of the legislature to deal justly and fairly with the various parties in interest. Alternative methods for the settlement of damages are provided and the provisions for the payment of damages are clear, certain and adequate.

Our decision is that Chapter 1278, Public Laws of Rhode Island, January Session, 1915, is not in violation of the provisions of Article XIV of the Amendments to the Constitution of the United States and the provisions of Article I, Section 5 and Section 10, of the Constitution of Rhode Island, as claimed by the complainants.

The papers in these cases with our decision certified thereon are ordered to be sent back to the Superior Court for further proceedings.

APR 20 1936

SUPREME COURT OF THE UNITED STATES

No. 220

No. 220

No. 221

No. 221

TURNER, SUPERINTENDENT, ETC.

TURNER, SUPERINTENDENT, ETC.

TURNER, SUPERINTENDENT, ETC.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 219

JOSLIN MANUFACTURING COMPANY

vs.

CITY OF PROVIDENCE, WALTER L. CLARKE, City Treasurer, et al.

No. 220

SCITUATE LIGHT & POWER COMPANY

vs.

CITY OF PROVIDENCE, WALTER L. CLARKE, City Treasurer, et al.

No. 221

THERESA B. JOSLIN

vs.

CITY OF PROVIDENCE, WALTER L. CLARKE, City Treasurer, et al.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF RHODE ISLAND.

FURTHER MEMORANDUM FOR PLAINTIFFS IN ERROR.

I.

By the well-settled law of Rhode Island, where these actions are pending and where the property lies, a taxpayer is

authorized to file a bill to enjoin the proposed illegal expenditure of public moneys by a municipality.

Austin *vs.* Coggershall, 12 Rhode Island, 329.
Smith *vs.* Westerly, 19 *Id.*, 437.
Ecroyd *vs.* Coggershall, 21 *Id.*, 1.
Blair *vs.* Franklin, 30 *Id.*, 413.
Same Case, 31 *Id.*, 95.

Blair *vs.* Franklin, *supra,* was a suit by a complainant, solely as a taxpayer, to enjoin respondent from proceeding to condemn land under a statute alleged to be unconstitutional as violative of the Fourteenth Amendment to the Federal Constitution.

The Supreme Court of Rhode Island in this very litigation, 41 R. I., 350 (see, also, Brief of Defendants in Error, Appendix, p. 49), recognized the right of the tax paying complainants to be heard.

And in *Crampton vs. Zabriskie,* 101 U. S., 601, this court upheld the right of a New Jersey taxpayer to maintain an action challenging the constitutionality of an act of that State, New Jersey, like Rhode Island, being a State where a taxpayer is accorded that right.

II.

The Water Act provides no "PRESENT AND CERTAIN METHOD OF PAYMENT" *to the land owner whose property is taken.*

The filing of the map by the Water Supply Board passes title, and after one year's possession may be taken by the city. The only redress of the owner who cannot agree as to

the amount of compensation to which he is entitled is (sec. 23) a suit at law, with the right after final determination of the compensation to which he is entitled "to have execution issue."

The rule is that if possession be taken the owner is at least entitled to have *a certain present method of compensation* provided.

Madison Ville *vs.* Bernard, 196 U. S., 231.
Bragg *vs.* Weaver, 251 U. S., 57.
Hays *vs.* Seattle, 251 *Id.*, 233.
Sage *vs.* Brooklyn, 89 N. Y., 189, 195.
Cherokee *vs.* Southern Kansas, 135 U. S., 641, 659.

And it must appear that such method is certain and sure.

Many cases have been decided upon the existence of a specific fund to which the landowner may look for his compensation; but we know of no case sanctioning the idea that a mere "right to issue execution" against a municipality has been held to comply with the constitutional requirement.

The city's public property cannot be levied upon—unwilling city officials can embarass, if not wholly frustrate the owner.

Counsel for the city openly stated in this court that the town of Scituate, Rhode Island, shown on the map produced by him, is insolvent.

We know nothing of the financial condition of the city of Providence, particularly after this enormous undertaking shall have been completed. We do know that a vast amount of valuable and productive property, real and personal, of plaintiffs in error is sought to be taken by the city and if it be taken plaintiffs in error are entitled to be

protected in their constitutional right: to have it done under a law whereby a present and certain method of payment therefor will be assured to them.

See language of the chancellor in Chapman *vs.* Gate, 54 N. Y., 132, 146.

In conclusion we submit that this act takes the utmost care, financially, of the landowner who agrees with the city upon a price for his property, but bars from such protection the landowner who fails to agree.

This clearly appears in the following brief résumé of certain features of the act:

1. While the act permits the Water Board to acquire land by purchase for the project, the Board cannot do this until after the city council of Providence has first made provision for the necessary funds to pay the landowner (sec. 3).

2. If the owner of a business in the condemned area *agrees* with the city upon the amount to be paid for his premises and surrenders his business, the city is required to *forthwith* pay the owner the amount agreed upon. But if the owner does not *agree,* his "just compensation shall be determined and be collectible in the same manner as is hereinafter provided for determining and collecting the damages for land taken hereunder" viz.: he is permitted to have an execution against the city (Sect. 16).

3. Upon the filing by the city of a statement and plat, the title to the land mentioned therein vests in the city. If the land owner agrees upon the price to be paid to him by the city, the city is required to make payment to him *forthwith.* If he fails to agree he may have an execution against

the city. Of the many cases that we have examined, where the courts have held that the provision for just compensation was adequate, in none of them has there been a failure, as in this case, to properly provide a sure and certain method for the satisfaction of the award granted to the landowner.

Is it not evident that the act in this respect has for its object the coercion of the land owner? Does it not, in effect, say to the land owner: "If you agree upon a price you will be paid immediately from a special fund we have provided for this purpose? If you do not agree, you may have a judgment upon which an execution will issue." We will have your property and you will have an execution against the city.

Plaintiff in error respectfully submits that such legislation does not fulfill the requirement of just compensation; that such an act is vicious and illegal and is the taking of property without due process of law, in that it fails to provide just compensation to the land owner whose property is sought to be taken.

Respectfully submitted.

ROBERT H. McCARTER,
FRANCIS I. McCANNA,
ALFRED G. CHAFFEE,
JAMES HARRIS,
Attorneys for Plaintiff in Error.

FILED
APR 16 1923
WM. R. STANSBURY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 219

JOSLIN MANUFACTURING COMPANY

vs.

WALTER L. CLARKE, City Treasurer et al.

No. 220

SCITUATE LIGHT & POWER COMPANY

vs.

WALTER L. CLARKE, City Treasurer et al.

No. 221

THERESA B. JOSLIN

vs.

WALTER L. CLARKE, City Treasurer et al.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF RHODE ISLAND.

SUPPLEMENTAL BRIEF FOR PLAINTIFFS IN ERROR IN SUPPORT OF THEIR PETITION FOR WRITS OF ERROR.

ROBERT H. McCARTER,
FRANCIS I. McCANNA,
ALFRED G. CHAFFEE,
JAMES HARRIS,
Attorneys for the Plaintiffs in Error.

(28,595)

(28,596)

(28,597)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 219

JOSLIN MANUFACTURING COMPANY

vs.

CITY OF PROVIDENCE, WALTER L. CLARKE, CITY TREASURER ET AL.

No. 220

SCITUATE LIGHT & POWER COMPANY

vs.

CITY OF PROVIDENCE, WALTER L. CLARKE, CITY TREASURER ET AL.

No. 221

THERESA B. JOSLIN

vs.

CITY OF PROVIDENCE, WALTER L. CLARKE, CITY TREASURER ET AL.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF RHODE ISLAND.

SUPPLEMENTAL BRIEF FOR PLAINTIFFS IN ERROR.

I.

The brief of the defendants in error contains some misstatements of both fact and law, which should be pointed out,

and as it was only recently served, we take this way of bringing these errors to the attention of the court.

On page 21, the statement is made:

> "It is true that the complainants allege an excessive and unnecessary taking, although the legislature has not in this case, as in many cases, given a general authority to condemn, but the legislature has itself passed upon this question by fixing a definite area, beyond or not related to which the city cannot condemn any lands or rights, and by giving to the city full authority to acquire by purchase and condemnation all within this area. The only discretion vested by the State in the city authorities is to take less than the legislature has authorized. The legislature has decided how much land and what waters may be regarded as necessarily and properly taken. It has imposed upon the Water Supply Board the duty of preparing the preliminary details and the responsibility of recommending to the city council as to what lands and water rights within or relating to the prescribed area should be taken, and the city council, in passing upon the necessity of the taking could not exceed the limitations of the authorized taking, but might reduce the extent of the taking, and, as will appear from an examination of the area authorized in the act to be taken and the area taken under the statement of the taking, which is set forth as Exhibit A in the complainants' bills, transcript of record, p. 39, the city council, although taking most did not take all the lands included in said area. Surely the determination by the appointed authorities to refrain from exercising the full authority vested in them by the act, cannot be regarded as an obvious and gross abuse of discretion or as an objectionable *'ex parte'* decision, and what was so expressly authorized to be done should be regarded the same as if done by the legislature itself directly."

The real fact is just the contrary. Much land has been taken for the aqueduct which, as appears from the map attached to the brief of defendants in error is entirely outside the red lines, and this, as shown in our main brief, constitutes the basis for our claim of improper exercise of the right to determine what shall be taken.

We do not contend that the question as to what shall be taken is a judicial one; all we assert is that, under the peculiar circumstances of this case, it was not competent for the Legislature itself to specify what shall be taken by the red lines displaying the purported whole area from which the delegated agent might properly be authorized to choose specific parts, without the necessity of according a hearing to the land owner, and then, in addition, seek to bestow upon such agent, *i. e.*, the interested city, an unlimited discretion also to appropriate *ex parte* as much additional land as it may choose.

II.

We believe the defendants in error have misconceived the effect of the clause of the Fourteenth Amendment forbidding discrimination.

The true statement is that contained in *Freed v. Barber Asphalt Co.*, 194 U. S., 618, 621:

> *"The provision of the Federal Constitution is satisfied if all persons similarly situated are treated alike in privileges conferred or liabilities imposed."*

Now, it is not universally true that damages to business were never an element to be considered in cases of this kind. Some States hold one way and others the contrary. Rhode Island is and, apparently, always has been among those

that give to an established business, some consideration in estimating damages (*Williams v. Tripp,* 11 R. I., 447, 453), and the trend of legislation has undoubtedly been to permit such damages to be estimated in those States in which theretofore the courts had held otherwise. *Whiting v. Commissioners,* 196 Mass., 468; 82 N. E. Rep., 270; *Matter of New York Board of Water Supply,* 211 N. Y., 174; *Brown v. West Side Electric Railway Company,* 166 Ill., 434; *White v. Her Majesty's Works,* 22 L. T. U. S., 591.

Now we contend that where the legislature straightens out the confusion and, if you will, "confers the privilege" of having such damages included in an award, it must treat all alike. It cannot create an illusive or capricious classification and confer the privilege upon some and exclude others of the same class.

In section 16 of the act a distinction in this right to recover damages is made between any business located in Scituate, or on the north side of the Pawtucket River, which was established prior to the passage of the act, and any business located elsewhere (but nevertheless taken) or established since the act was passed. There is a twofold discrimination—location and time of establishment. Now, why this discrimination in favor of the business located in Scituate and against that located in Foster or Cranston?

Again, why the discrimination against a business *bona fide* established *after* the passage of the act?

The mere passage of the act did not appropriate the property. The Water Board and the City Council had to determine what property (whether within or without the red lines) should be taken, and to file a statement indicating their choice and determination (sections 3 and 4); and it is well settled that legislation seeking to limit the owner in the

use of his property, authorized to be taken, but not in fact taken, is vicious (*Edwards v. Bruorton,* 184 Mass., 529; *People v. Priest,* 206 N. Y., 274).

The question is one of good faith on the part of the owner. He may use his property as he chooses and so long as he has not trifled with the situation and purposely sought to swell his damages, he is entitled to be compensated for his improvements, *bona fide* made, before the property is taken, although such taking be authorized (*State v. Carragan,* 36 N. J. Law, 52).

It must be remembered the bill of complaint alleges (*Joslin Co. v. Providence,* No. 219, p. 22),

> "there are numerous cases of businesses established in good faith within said area after the passage of said act, but before the condemnation of land by the city of Providence."

This is undenied by the answer and must be taken as true.

III.

So, too, with respect to the discrimination as to compensating for the expense of moving machinery between owners who move to the New England States and those who move elsewhere. The same argument applies.

It cannot be said, as a matter of law, before specific legislation on the subject, that an owner of land whose property is appropriated, if his machinery is thereby required to be moved to be thereafter used, cannot recover the cost of such removal (*Benton v. Brookline,* Mass. Sup. Jud. Ct., 23 N. E. Rep., 846), and when the legislature confers on some the specific right to be compensated, it must not illusively discriminate in the act.

The defendants in error claim, however, that the plaintiffs in error are in no position to avail themselves of this illegal discrimination, because it nowhere appears that they are thus discriminated against. In this we think they are also in error.

IV.

The Plaintiffs-in-error Have Sufficient Legal Interest in the Question.

This is in reply to issue 6, point I, and issue 7, point I, of the brief for the defendants-in-error.

We do not question the doctrine of *Steamship Co. vs. Emigration Commissioners,* 113 U. S., 33, cited by the defendants-in-error, to the effect that this court has no jurisdiction to pronounce any statute void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. That is undoubted. In the case at bar, however, the plaintiffs-in-error own land which is sought to be taken in eminent domain. Furthermore, two of the plaintiffs-in-error are taxpayers of the municipality seeking to condemn those lands, and which municipality is responsible for the payment of the just compensation. In both capacities, they object to the condemnation proceedings on the ground that the statute, pursuant to which the proceedings are taken, is unconstitutioanl. This certainly is an actual controversy, and it is a legal right of a landowner that his land be taken in condemnation only pursuant to a valid statute. In like manner, it is the right of a taxpayer that his taxes be not augmented by the payment of condemnation moneys under an unconstitutional statute.

In *Sweet v. the City of Syracuse,* 128 N. Y., 680; 27 N. E., 1081, a taxpayer of Syracuse brought suit to enjoin that city from carrying into effect condemnation proceedings, pursuant to a New York statute. He alleged that the statute was obnoxious under article III, section 16 of the State Constitution, providing that no local or private bill should embrace more than one subject and that subject should be expressed in its title. The Court of Appeals of New York felt that that point was validly raised, and took pains to consider and decide that the statute in question did not conflict with the State Constitution in that particular. Obviously, the taxpayer had no particular interest in the matter, except that the statute was unconstitutional. *Astor v. the Arcade Railway Co.,* 113 N. Y., 93. In this case, a property owner, whose property was sought to be taken, pursuant to a statute of New York, resisted the proceedings on the ground that the statute conflicted with the same provision of the New York Constitution, as was raised in the case just cited. The Court of Appeals held that the statute did conflict with the constitutional provision, and at the suit of the landowner, restrained the proceedings. To the same effect is *Matter of New York and Long Island Bridge Co.,* 148 N. Y., 540. In this case, the landowner resisted condemnation on various grounds, including an attack upon the constitutionality of an amendment to the special act authorizing the bridge, which amendment referred only to an approach to the bridge, which did not affect his lands. The court held that those provisions were separable, and while undoubtedly unconstitutional, could be exscinded, and let the body of the original act stand. It was nowhere suggested that the landowner had no standing to raise the point. *Appeal of Wilbert,* 137

Penn. State, 494; 21 Atl., 704. In this case, a landowner objected to condemnation, pursuant to a Pennsylvania statute, was allowed successfully to attack the unconstitutionality of that statute, and upset the condemnation proceedings on the ground that the statute violated article III, section 7 of the Constitution of Pennsylvania, which prohibited the passage of any local or special law regulating the jurisdiction of, or practice in, the courts. Many other cases to the same effect are cited in Lewis Eminent Domain, 2nd Ed., §261C.

In none of the cases above cited was the complaining landowner specially affected by the alleged unconstitutionality. He was seeking to enforce nothing but the general right of all landowners, not to have their property taken by condemnation, except by a constitutional statute. That same right inheres in the plaintiffs in error. As landowners, they have the right not to have their property taken, except upon eminent domain, and eminent domain can be exercised only by a constitutional statute. An act which conflicts with the Fourteenth Amendment to the Constitution of the United States is surely just as void as an act which conflicts with one of the technical requirements of a State constitution. The same principle, of course, applies to two of the plaintiffs in error, in their capacity as taxpayers of the city of Providence.

Respectfully submitted,

ROBERT H. McCARTER,
FRANCIS I. McCANNA,
ALFRED G. CHAFFEE,
JAMES HARRIS,
Attorneys for the Plaintiffs in Error.

(9106)